
Investor-state Dispute under International Investment Law

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Abstract

Since the last century international investment law has been developing along with the increasing number of international investment agreements such as bilateral investment treaties aiming at efficient protection for foreign direct investment. The idea to introduce comprehensive protection for foreign direct investment appeared with the States started to perceive that foreign direct investment is a must for the prosperity of economic development of the countries. Since the international investment regime has emerged it started to become universal and uniform in the international economy. The establishment of the International Centre for Settlement of Investment Disputes was a crucial step for the protection of foreign direct investment in the international investment regime. The investor-state dispute settlement system has been developing through innovations introduced by parties of the international investment regime. However, Investor-State arbitration has remained as one of the most efficient mechanisms in the investor-state dispute settlement system throughout the years.

Keywords: International Investment Law, Invertors Disputes, Investment, Law.

1. Introduction

During the last few decades, international investment law has emerged through the conclusion of numerous international investment agreements for the protection of foreign direct investment. The United Nations Conference on Trade and Development states have concluded 3,196 bilateral investment treaties which constitute the current international investment regime. Despite a few differences between the content of the bilateral investment treaties, the international investment treaties constitute a regime and a network of multilateral treaties with common features such as principles, norms, and rules. The main goal of the international investment regime is to establish a system of protection against the actions of the host states. In this respect, it is clear that the primary aim of the international investment regime is to protect foreign direct investment which I will be discussing in my research.

2. The concept of the legal basis of International Investment Law

In respect of the sources of international investment law, it is quite essential to discuss the sources of international investment law which can be listed as Convention on the Settlement of Investment Disputes between States and National of the Other States, the bilateral investment treaties, customary international law, general principles of law stated in the Statute of the International Court of Justice, and case law of the arbitration tribunals.

3. The essence of Customary International Law

Since the early years of the last century, customary international law has been considered the primary source of international investment law. Despite the fact that international investment law is mainly originated by the treaties, the customary international law has also a quite crucial influence on the international investment law. Customary International Law is applied in the practice of investment arbitration. Rules on damage, rules of expropriation, rules on denial justice, state responsibility, and rules of arbitration in foreign investment law are originated from customary international law. However, the broad interpretation of customary international law is essential for their application in foreign investment law. The customary international law indicates procedural guarantees such as fair treatment and protection of investors by origin countries for foreign investors. As the primary source of international investment law, customary international law prompted an obligation of treatment of investors in accordance with international minimum standards for host states. However, according to Kenneth J. Vandavelde customary international law provided an insufficient mechanism for the protection of foreign direct investment as Latin American states stated through the adoption of the Calvo doctrine that the investment importing countries were obliged to treat investors in the best capacity that they could afford. Besides that, argument, international minimum standards prompted by customary international law were seen as not demanding and vague in essence. Other principles derived from customary international law such as the principle of sovereign equality and the principle of peaceful settlement of disputes were unanimously accepted by developed and developing countries. However, the right of host states to expropriation was quite arguably and irreconcilable as we discussed in the history of international investment law.

4. The impact of the Bilateral Investment Treaties on international investment regimes

It is worth mentioning that Bilateral Investment Treaties are the most important source of contemporary international investment law. The bilateral investment treaties provide the substantive rules for the protection of foreign investments. The treatment of foreign investors is regulated by bilateral investment treaties signed by contracting parties. Moreover, bilateral investment treaties assign guarantees for the investments of investors from one of the contracting states in the other contracting state. The principles such as a guarantee of fair and equal treatment; a guarantee of full protection and security; a guarantee against arbitrary and discriminatory treatment; a guarantee of national treatment and a guarantee of most-favored-nation treatment guarantees of fair payment of compensation in case of expropriation are indicated in the Bilateral Investment Treaties. In the global era of international investment law, the foreign investor is no longer expected to go before the local courts of the host state or to trigger its claims “espoused” by its home state. Under bilateral investment treaties, foreign investors are obliged to opt for international arbitration or other tribunals as agreed upon through provisions of the treaties.

The contribution of bilateral investment treaties to the development of contemporary international investment law is quite precious. According to the former President of the International Court of Justice, Judge Schwebel, “customary international law governing the treatment of foreign investment has been reshaped to embody the principles of law found in more than two thousand bilateral investment treaties”. Doubtlessly, bilateral investment treaties

signed during the evolution of international investment law have reshaped contemporary customs, and bilateral investment treaties truly represent new customs in international investment law.

5. Globalization of international investment policy

With the establishment of the International Centre for Settlement of Investment Disputes (ICSID) in the result of the Convention on the Settlement of Investment Dispute between States and Nationals of other States which is a first multilateral treaty, a new step in the protection of foreign investment happened. As the result of the Convention on the Settlement of Investment Dispute between States and Nationals of other States entered into force, the investment dispute became depoliticized and a new forum for dispute settlement was established. The Convention of the ICSID established a neutral institution for the settlement of investment disputes. Independent judgment of the ICSID prompted strengthened partnership and mutual confidence among the contracting parties of the Convention of the ICSID. The Convention of the ICSID provides a procedural framework for dispute settlement between host states and foreign investors through conciliation or arbitration. The advantage of the ICSID is neither an appeal to national courts nor a review by national courts is allowed which makes the Centre an independent and neutral forum. Nevertheless, the Convention of the ICSID does not contain substantive standards of protection for investments. Until the global era of international investment law, the productivity of the ICSID regarding produced case law was not so significant. But, after the rapid growth of the number of bilateral investment treaties and newly arisen disputes, the case-law of the ICSID started to become essential towards investment issues, although the case-law of the ICSID does not have a retroactive effect. Moreover, the ICSID Convention granted foreign investors an opportunity to claim compensation from a host state in case of a breach of the provisions of the bilateral investment treaties. In addition, with the Convention of the ICSID, non-state entities such as business enterprises acquired a chance to sue the states directly.

General principles of law as stated in the respective provisions of the Statute of the International Court of Justice are also applied to the international investment law and considered as one of the highly important sources of international investment law. The principles such as the principles of bona fide, estoppel, onus probandi, and the right to be heard are respected by the international tribunals likewise International Centre for Settlement of Investment Disputes.

6. Legal analysis of International Investment Dispute Settlement Mechanisms

6.1 Development of Investor-State Dispute Settlement Mechanism

By analyzing the historical development of International Investment Dispute Settlement, it is possible to state that not all the dispute settlement mechanisms have been favorable to the investors with the concept of foreign direct investment. However, with the emergence of international investment law, new concepts, doctrines, and mechanisms have been introduced together with the establishment of new platforms and forums for international investment dispute settlement. In the context of the development of international investment dispute settlement, the role of the investors has been quite vital as international investment law has been rapidly reshaped thanks to the efforts of the investors. In order to analyze the process of the development

of international investment dispute settlement and its benefits to foreign investors, the concept of various international investment dispute settlements will be examined starting from the early stages to the global area of international investment law.

Until the introduction of the Investor-State Dispute Settlement (ISDS) mechanism, the state espousal of the claim or a threat to use military force handled investor-state disputes. Espousal, seen as an unsatisfactory mechanism, is the claim of the national of the state is undertaken by national's state against the state that claims raised against. However, the mechanism of the espousal is not quite satisfactory for the investor, national of the state, as the home state does not have any obligation before the law to espouse a claim of its national. In many cases, the home state sees espousal as a risk to politically damage its diplomatic relations with the host state of its national, the investor. Moreover, the home state only espouses a claim when its national has already tried all the options provided him by national law before domestic courts. However, another unsatisfactory point to the investor was once its home state has undertaken the claim, the investor does not have any control over its claim, and the home state has explicitly freedom of will regarding how to settle the investment dispute with the host state of the investor. The result of the settlement of the espousal mechanism is unpredictable and unforeseen for the investor as the host state can disagree to settle the dispute. In addition, diplomacy has also been quite an efficient mechanism to settle investment disputes between states. However, the states do not always use diplomacy as an instrument to settle disputes, but also as a military force to protect foreign investments, which can be argued whether that method benefited the investors.

As the result of the emergence of international investment law and investor-state dispute settlement, various arbitration forums have been established, most necessary, the International Centre for Settlement of Investment Disputes. The arbitration forums are seen as reliable, neutral, and impartial institutions by foreign investors. Generally, the arbitration forums deal with arbitration proceedings in accordance with international minimum standards or other rules such as the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Moreover, the Contracting Parties of the bilateral investment treaties have freedom of choice of applicable law and arbitration forums to submit a claim in case of disputes such as commercial and investment disputes. Various arbitration forums specialized in commercial disputes can be listed, such as the Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA). In the area of international investment disputes, the most practical and well-known arbitration forums are the International Centre for Settlement of Investment Disputes and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). In addition, international arbitration forums such as the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and the Kuala Lumpur Regional Centre for Arbitration (KLRCA) offer arbitration panels for both investment and commercial disputes. The disputes involving a state or state public entity as part of the dispute are usually dealt with by mostly two of the above-mentioned institutions, the International Centre for Settlement of Investment Disputes, and the Permanent Court of Arbitration (PCA) in The Hague.

6.2 Investor-State Dispute Settlement under the International Centre for Settlement of Investment Disputes.

The ICSID established by the International Bank for Reconstruction and Development aims at the facilitation of the settlement of investor-state disputes. The ICSID established with the Convention on the Settlement of International Investment Disputes between States and Nationals of Other States has jurisdiction over the disputes whereby the institution has been indicated as an arbitration forum in the provision of an investment treaty. It is also quite essential to emphasize that investment disputes affect a whole class of investors and class of certain investment issues between investor and state. With the Convention of the ICSID, foreign investors carrying out business activity in the territories of foreign countries acquired a right to sue the host states for any breach of the contractual obligation before the international arbitral forum that is neutral and impartial. The role of the governments of home states of foreign investors lost its importance within the scope of espousal as investors obtained an opportunity to challenge host states on their own behalf. In the light of the emergence of investor-state dispute settlement, this was a huge advantage for the individuals such as entrepreneurs, investors, and corporations that they could directly sue states. Another significant point in the emergence of the investor-state dispute settlement was that states significantly lost their state immunity under the Convention of the ICSID during arbitral proceedings. The states and investors were equal before international investment law within the framework of the Convention of the ICSID.

Currently, the ICSID has been indicated as an arbitration institution in most international investment agreements. One of the significant features of the ICSID is its arbitral awards do not require domestic recognition and are directly enforceable within the Convention of the ICSID which is quite practical and efficient for foreign investors. The feature of the direct enforceability prompts with effective protection of foreign investment as foreign investors save time and are not expected to go through domestic enforcement procedures in order to enforce the arbitral award issued by the ICSID. The awards of the ICSID are considered as a final judgment of the court and are directly executable in all the Contracting States of the Convention of the ICSID. However, foreign investors can only start legal proceedings to the home state unless that state is the contracting party of the Convention of the ICSID. In addition, the ICSID should be indicated as an arbitral forum in the international investment agreements between the home state and the host state of foreign investors, thereby the ICSID may have jurisdiction over the investor-state investment dispute.

The arbitral process within the ICSID has certain advantages not only for foreign investors but also for the host states. Obviously, the advantage of a foreign investor is direct access to international arbitration that is impartial and neutral. But the advantage of the host state is that the host state enhances its investment climate by offering a disposition of direct access to international arbitration that results in attracting more foreign investors to the country. Moreover, the host state obtains immunity towards any other international litigation except the arbitral proceedings with the ICSID. In addition, only the investment disputes with the written consent of both parties of the investment dispute can be submitted to the ICSID. Even though the term “investment” is frequently used in the Convention of the ICSID, its definition is not provided by the Convention itself. However, international investment agreements such as bilateral investment treaties define the notion of “investment”. As the concept of “investment” is quite broad, diverse

activities in different areas of the economy of the host state are considered as “investment”.

The ICSID as a specialized institution dealing with investment disputes guarantees high competency and eliminates barriers of nationality in investment issues. Despite the fact that the ICSID offers a wide range of advantages to the investors and host states, it also has certain disadvantages for the parties. One of the highly criticized features of the ICSID is that the arbitral awards of the ICSID cannot be challenged or appealed except on certain limited grounds. The awards of the ICSID cannot be challenged by any contracting state before its own local courts. However, we should not forget that the ICSID has provided foreign investors with safety in relations with host states, and host states have been convinced of the absence of politics in investment relations with private investors.

The Convention of the ICSID does not indicate any substantive rules to be applied in arbitral proceedings. The ICSID only offers an investment dispute settlement procedure. Nevertheless, the parties to the disputes have a freedom of choice applicable law with mutual agreement. A little number of international investment agreements refer to the national law of the home state as a governing law of the dispute. The role of international law in governing law is also highly essential and applied. Moreover, the investors and host states are bounded by dispute settlement provisions on applicable law in case of investment disputes indicated in international investment agreements signed by them. As we highlighted the award of the ICSID cannot be appealed but annulled through special proceedings within the framework of the Convention of the ICSID. Annulment is directly dealing with the legitimacy of the decision-making process. However, annulment proceeding does not replace the award but removes it. The Convention of the ICSID lists certain grounds for annulment under article 52. Nevertheless, the Convention of the ICSID does not indicate the application of improper law as a ground for annulment. The applicable law is quite an essential part of the consensus of the parties of the dispute. But the application of improper law can be interpreted as an excess of the power of the ICSID and considered as a valid ground for annulment. Moreover, the application of improper law results in an incorrect decision that is ground for annulment.

According to article 53 of the Convention of the ICSID, the award of the ICSID is final and binding for the parties of the investment dispute. The obligation of the debtor is to comply with the award without any condition. The home state of the investor can trigger the diplomatic protection of the investment of its national in case of non-compliance of the host state with the award of the tribunal. An advantageous feature of the awards of the ICSID is that compliance with its awards is facilitated through the World Bank. Moreover, article 54 (1) of the Convention of the ICSID states that awards are to be recognized as binding and the obligations arising by the award are to be enforced as final domestic judgments in all contracting states of the Convention. The enforcement of the awards of the ICSID is subject to the procedural rules of the execution of judgments in each contracting state. Only the authentication of the award of the ICSID should be verified by the domestic court under articles 54 (2) and 54 (3) of the Convention of the ICSID.

In case of enforcement of the arbitral award, there are several options for investors as followed: seeking one or more enforcement jurisdictions to enforce the award, seeking diplomatic protection from its home state, complaining to the arbitration that issued the award, selling award in a secondary market with discount. The non-compliance of the host state with the award of the

arbitration has forced foreign investors to enforce the award in their national jurisdictions as well. One of the well-known cases regarding enforced awards in national jurisdictions is *Werner Schneider versus the Kingdom of Thailand*. As the news reported that a Boeing 737 plane belonging to the Thai government was seized upon the request of the insolvency administrator of the German company stating that the German company had won an award worth \$43 million against the government of the Kingdom of Thailand in the arbitral forum in Geneva. The crisis gave a rise to tensions in diplomatic relations between disputing parties. The argument of the German side was the seizure of the property of the Thai government is a judicial matter and emphasized the previous attempts of the German government to obtain payment of the compensation for its investor. The Convention of the ICSID includes a provision for the contracting state to institute proceedings at the International Court of Justice within the right to exercise diplomatic protection in case of the host state does not comply with the award of the tribunal. Unlike the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) did not offer any diplomatic protection, the Convention of the ICSID provided a clause for the jurisdiction of the International Court of Justice for the first time under article 64: “any dispute arising between the Contracting States concerning the interpretation or application of this Convention”.

6.3 Investor-State Dispute Settlement under regional investment agreements.

Alongside the Convention of the ICSID, there are other international investment agreements and free trade agreements such as the North American Free Trade Agreement (NAFTA). The North American Free Trade Agreement was signed by the United States of America, Canada, and Mexico in 1992. The objective of NAFTA is to promote various opportunities for investment by providing a reasonable investor protection mechanism. The expropriation and nationalization of the assets of foreign investors have been restricted under NAFTA. Moreover, one of the objectives of NAFTA is to introduce and guarantee the prompt, adequate, and effective standard of compensation to foreign investors including fair and equitable treatment to investors. Protective sections of NAFTA contain a mechanism for parties to force a foreign government to go through arbitral proceedings under the rules of ICSID and UNCITRAL. One of the advantages of NAFTA to foreign investors is the low costs of litigation that help investors to save financial costs of arbitral proceedings. Moreover, security against direct and indirect expropriation is provided by NAFTA. Despite the fact that NAFTA does not provide the definitions of direct and indirect expropriation, international law clarifies what direct and indirect expropriation is. Under international law, indirect expropriation is a measure having an equal effect to expropriation Under Chapter 11 of NAFTA, foreign investors obtain an opportunity to sue governments directly in case of any breach of the agreement. However, the absence of the appeal proceedings under procedural rules of the tribunal provided under NAFTA leads to instability and unpredictability. Another issue that concerns foreign investors is that the awards of both arbitrations under the ICSID or UNCITRAL cannot be published without the consent of both parties of the investment disputes which leads to the lack of transparency among investors. It is also quite essential to emphasize that awards of arbitral tribunals have binding force only for the disputing parties and to the particular subject matter of the dispute and cannot be applied as binding case-law in prospective disputes. Nevertheless, taking into consideration all the above-

mentioned features, NAFTA has provided a potentially fair and secure arbitral system.

7. Conclusion

Since the 19th century, international investment law has been emerging through various stages by responding the economic and political demands. During its early stages, the primary means of the protection of foreign investment were the use of a military force recognized as a legitimate means by customary international law. With concluding commercial agreements by different countries, the protection of foreign investment became a crucial provision in international investment agreements. However, the protection of foreign investment was quite limited in the international investment regime. After the end of the Second World War, the use of force was delegitimized as a core basis in the protection of foreign investment. The developing countries stood against the integration to the international economy as the result of misperception of the essence of the role of foreign direct investment in the market economy. In another hand, the capital-exporter countries had reasonable and legitimate fear of expropriation by the home states. The approach of the developing countries together with the Socialist bloc caused the developed states to provide a universal legal framework for the protection of foreign direct investment. With the collapse of the Socialist bloc, the developing countries started to understand the crucial importance of foreign direct investment in their economies. The developing countries started to conclude international investment agreements with other countries and tried to attract foreign investors to invest in their economies. By that time, the international investment regime has started to become universal and uniform in the international economy.

Especially, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States is considered as a significant step in establishing an international investor-state dispute settlement system under which investors can sue foreign states. The creation of the International Centre for Settlement of Investment Disputes should be referred to as a crucial instrument for the protection of foreign direct investment in international investment regimes. Investment arbitration has remained as one of the most efficient mechanisms in investor-state dispute settlement systems.

The approach towards investor-state arbitration has been evolving through innovations provided by key actors of international investment regimes such as the European Union. As we discussed previously, the European Union is a quite complex entity comprised of 28 Member States and different competent institutions which prompts difficulty to present a common view towards investment regime. The stance of the European Commission as the main external trade negotiator is evolved and formulated by various conflicting demands. The investor-state arbitration under the CETA and the TTIP of the European Union is more predictable and transparent than other investor-state dispute settlement mechanisms under the international investment regime. Most importantly, the establishment of a new permanent investment court under the TTIP is quite promising for the comprehensive protection of foreign direct investment. Alongside other international investment regimes, the European Union has drafted its own negotiating model that creates new standards for the protection of foreign investment.

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