Rights and Obligations of a State in International Investments

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Abstract

The business relations are now the core of a globalized economy. With the increasing trade, investments that were long before restricted to its own economy have started to spread in other neighboring countries looking into the scope of increasing business relations. To increase its reach, their Municipal Government started supporting it and hence Treaties under the name of "Friendship, Commerce and Navigation" were signed between the states. These treaties saw a sudden shift from Bilateral to Multilateral treaties.

The main objective of such treaties was to ensure that the Contracting States protected the rights of its investors. With the shift in time, the scope of these treaties was widened and hence included wide types of clauses like full security and protection, fair and equitable treatment, umbrella clause etc.

The full security clause protects the investor of his investment i.e.) he shall get full security as he shall get full security by the state by laying down domestic laws for protection of his legal and commercial rights. To make the scope of this clause even wider, the treaty would include fair and equitable treatment which would provide that the contracting states has to give basic and minimum equal treatment to its citizens without discrimination. The umbrella clause provides that the investor can invoke other provisions of the same treaty by interpreting the object and need of the treaty by concentrating on the intention of the state parties to enter into such a treaty. The MFN clause introduced by President Roosevelt, is to provide an advantage for an investor who is technically not allowed the advantage that the granting state party has given to the third state.

To add to, the treaties Vis a Vis International law gives a forum to address grievances by allowing the contracting states to ask for reparations (compensation) if there is a breach of any minute clause of a gross violation in the interest of its investor and the said investment. It creates a systematic control over the affairs of the state and the treaties entered into.

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Introduction

The world is becoming a smaller unit with the increase on globalization. Since time immemorial, investments and trading have become an essential part of any growing economy and protection is necessary for such investments. To protect such investments and investors, the countries get into Bilateral and Multilateral Treaties. After the World War II, for protection of rights of investors who invest in a foreign economy, the treaty of Friendship, Commerce and Navigation was provided. Even today for multilateral and bilateral treaties, such treaties are the origin. With such treaties in force, the scope and objective of increasing investment relations are strengthened. Benefits to the investors and host countries (Contracting parties) are provided by such treaties. Along with this, the liabilities of such contracting parties are also mentioned. A remedial clause in case of a breach is also provided specifically in such treaty provisions. The contracting parties can refer to the Public International Law or the Customary Laws for enforcement of rights in case there is no specific detailing provided in the provisions of the contract.

All treaties much have provision for full and equitable treatment, complete security and protection, under the International law. An Umbrella clause and MFN (Most Favored Nation) clause along with remedial clause in case of breach is always provided by the treaties to allow smooth facilitation of trade. Provisional Application clause is also provided by certain treaties with mentions the time period between signing and ratification of the treaty that governs the rights of contracting parties and citizens during the provisional time

Full Security and Protection

The host state has an obligation to create a framework actively to grant security. The measures taken should be capable to protect the inventors from adverse action of state and private people. "Full security' does not only include investment environment that offers legal and commercial security, but also physical protection.[2]"Full" is used to protect the stability as an auxiliary term in context to the security mentioned. This provision is included in order to protect the rights of the investor[3]. The courts have held that when any investor is investing in a contracting party, it's the obligation of the host state to follow diligentia quam in suisi.e. the State has taken the same care of the investor and the investor's assets of another contracting state as it would have of its own investors and help resolve disputes related to investments of its own nationals.

[2]Azurix v. Argentina, ICSID Case No. ARB/01/12; BiwaterGauff v. Tanzania, ICSID Case No. ARB/05/22.
[3]Total v. Argentina, ICSID Case No. ARB/04/1; Levy de Levi v. Peru, ICSID Case No. ARB/10/17.

There is protection given against expropriation given by such security that takes away the property of the investor. Such expropriation is done would be valid only if it's done for any public purposes or because of non- compliance of laws of the host state. There would be indirect expropriation if the actions of the state causes hindrances to the investor in carrying out the business and the investor is protected against such acts as well. We cannot find a simple straight jacket method to define indirect expropriation in International law but tribunals have carefully carved out an acceptable meaning. Some instances of the same would be significant deprivation of fundamental right of the ownership of investors assets, when the investor who is the financer and manager of the said investment is arrested, even though the title remains with the investor, the investment is rendered useless irrespective of the state's intention to do so,[4] whether a part of it is affected or the whole of it is rendered useless.[5]There are certain cases where it is temporary and partial[6] and so it doesn't deprive the investor the benefit he should receive for substantial duration and hence would not be an indirect expropriation.

Most favored nation clause

MFN clause is incorporated in a treaty to guarantee certain benefits a party to the treaty would get which the Contracting Party allows to a third State party. i.e. when any third state gets favorable treatment than the contracting state in respect of trade or investment, though the treaty specifically mentions about a certain advantage, contracting state can invoke the MFN clause and get a favorable treatment which could be extended to a third party as well. "As a consequence to this, MFN Clause has a multilateral treatment to bilateral state treaty relationship and hence harmonizes the protection of foreign investments in a host State". There is a spirit of equality for competing in the investing states due to such favorable treatment given. This originated first to provide for an equal footing in trade and commerce. This clause can be invoked by the parties only if the subject matter of both the treaties is the same[7] that is to say, the rule of Ejusdem Generis is applied. There is a very thin line of difference between synonymous trade and investment. Trade means buying and selling while investment means use of investor's money in purchasing property out of which there is an intention to derive an income[8]. It should also be noted that MFN clause cannot always be

[4]Starrett Housing Corporation v. Republic of Iran, ICSID case no. 24.
[5]*Supra*note3.
[6]S.D. Myers Incorporated v. Canada, 2004 FC 38, (2004) 244 FTR 161.
[7]Maffezini v. Kingdom of Spain, Emilio Agustin Maffezini v. Kingdom of Spain, International Centre for Settlement of Investment Disputes, (lcsim) Case No. ARB/97/7, Decision of the Tribunal on Objections to jurisdiction, 25 January 2000, 40 I.L.M.1129, 2001.
[8] Affleck v James, ICSID Case no. ARB/23/2001.

invoked as a solution/remedy for any dispute resolution regarding deriving benefits of "disruptive treaty shopping".[9]

The MFN clause can also be applied retrospectively only if the treaty provides for such a benefit in order to provide uniformity and to foster the spirit of MFN. The contention against it is that if there is a specific time to apply the treaty that is already mentioned[10] or by interpreting a governing treaty you could get to know the date of enforcement of treaty, why should you apply it retrospectively? Such interpretation of treaty is mentioned in Article 31(2) of VCLT which states that the preamble, covenants, annexure and the main text is to be read together as a whole to interpret the rights of the investor.

Umbrella Clause

This protects the rights of investors along with the investment as this is the governing clause of any treaty. There is an obligation on the host state to protect and preserve these rights of the investors. Such an obligation is derived from Article 31 of the VCLT ever from the time the treaty is signed between the parties. It is also to be noted that such an obligation should be in good faith and thus the interpretation should be in its ordinary meaning taking into consideration the scope and object of the said treaty.[11] The point of debate would be regarding the expression "any obligation" since there is a scope for ambiguity in considering good faith as the basis, the parties can expand the scope and purpose as per their suitability and benefit accordingly.

Later, after World War II, there was a strong need felt to protect the rights of investors in your own territory as well as in alien jurisdiction. Thus there was an ideal shift to GATT in 1997 to expand the protection of such investors and investments.

Friendship, Navigation and Commerce treaties had certain set standards and criteria to protect the property, company and National origins of the Sate; while the BIT's and MIT's had an objective to protect the investor, his assets along with the investment. In, *SGS v. Philippines*[12] the tribunal held that the issue could only be resolved if the umbrella clause if invoked and the reciprocity provision of the treaty was applied.

Fair and Equitable Treatment

There should be fair and equitable treatment when minimum equitable standard of treatment is offered to foreign investor which is then offered to its own nation's investors. Such an

[9] Telenor MoblieCommc'ns AS v. Hungary, ICSID case no. ARB/04/15; Plasma Consortium v. Bulgaria, ICSID case no. ARB/03/24.
[10] TecnicasMedioambientalesTecmed SA v Mexico (ICSID Case No ARB(AF)/00/2, Award, 29 May 2003).
[11] Eurekav.Poland, RG 2006/1542/A.
[12] ICSID Case No.ARB/03/11.

obligation is adopted by Public International Law for refraining a State from adopting an unfair and inequitable practice when they deal with such investors and investments. Minimum treatment is never to be denied administrative, civil or criminal justice; this is provided under the Customary International Law. For promoting and protecting investments, States should act in a manner that it expects in return from the other State party. This is thus known as "due diligence" that the host state must follow for the investors of the other State.

Article 31(4) of VCLT states that to interpret any treaty, if a meaning is outside the scope of the treaty, it should be avoided at all times so as to reach the correct intention of the Contracting States. In order to interpret the correct intention of the drafters, an objective approach i.e. State practice is the best interpretation and not the subjective or the whimsical interpretation of the investor; else it would affect the capacity of the host State adversely in regulating the investment[13]. Host state will have to take preventive measures for protecting foreign investment that are reasonable under the circumstances and exercise 'due diligence'[14]

Remedies

Article 36, 37, 38 of Responsibility of States for International Wrongful Acts, 2001, provides for reparation if there is a breach of any treaty obligation. This provides reparation for three types of remedies (i) Restitution (ii) damages (iii) satisfaction. "or a combination of them in order to wipe out the effects of illegal acts had the same not been committed"[15] and the "injured party be made whole."[16]

Restitution of parties should be the primary reparation when the rights of investors are indirectly affected.[17] The claimant state can ask for moral and financial damages if restitutio in integrumis unable to be satisfied for damage that is in material or moral form when an internationally wrongful act is committed. When there is amoral damage, compensation is the most appropriate form of remedy.As it was held in *Desert Line Projects L.L.C. v. The Republic of Yemen*,[18] where 1 million USD was awarded as moral damages. But for it to be considered under exceptional circumstances, three conditions need to be satisfied:

(i) illegal detention, stress, anxiety, other mental suffering such as humiliation, shame and degradation

(ii) loss of reputation, credit and social position

[13]Teco Guatemala Holdings LIC v. the Republic of Guatemala, ICSID case no. ARB/10/17.
[14]RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT ARBITRATION 161 (2nd ed., 2012).
[15]Factory at Chorzow, Germany v. Poland, (1928) PCIJ Series A No. 17, ICGJ 255 (PCIJ 1928).
[16]RMS Lusitania case, Administrative *Decision* No. VI1923.
[17]NykombSynergetics Technology Holding AB v. Latvia Lic, 182 (2003).
[18]ICSID case no. ARB/05/17.

(iii) both cause and effect are grave and substantial[19]

Article 37 of ILC Draft Articles on State Responsibility states that Just Satisfaction is another kind of remedy where State has a liability to mend the Internationally Wrongful Act in case the breach is unable to be mended by restitution or compensation. This could also be in form of a formal public apology or regret or declaration by the State[20] for damages that cannot be assessable financially. But the tribunal should make sure that reparations are granted proportionally.

Conclusion

With the increasing trade and bilateral and multilateral treaties being entered into by States, the rights and obligations of the contracting State parties and its respective investors have come to be defined formally and in a better recognized manner. Due to full security and protection, fair and equitable treatment, MFN clause, Umbrella clause and remedial measures, a legal and a more secure commercial environment is available to investors and contracting States. These judgments given by the tribunal, though do not have any precedential value and are just persuasive in nature have set a trend of protecting rights of contracting parties and thus helps in the expansion of trade and business between States.

[19] Joseph CharlesLemire v. Ukraine, ICSID case no. ARB/06/18.
[20] Corfu Channel UK v. Albania (ICJ GL no. 1), (1949) ICJ Rep 4.