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INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 2

2020

International Investment Law A Guardian Through Provisions of ICSID and Denunciation of the Convention

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ABSTRACT

In this post-modern world, it is delightful to understand and see the rapid and blooming growth of economics and how individuals contribute to this development regardless of 'cross-bounder' or extra territorial transactions being necessary rather than optional. Also, it is of significant importance to understand that not all agreements and contracts between commercial organizations operating across borders or commercial organizations and states that they invest in are executed swiftly. Some transactions between entities get baleful and thus, give rise to a dispute which cannot or may not be adjudicated by the domestic laws of a state because of the transaction being extra territorial in nature. Overseeing situations like this, international agreements and contracts set out a dispute resolution clause which, authorizes the parties in the agreements to submit their dispute to an arbitration tribunal. These tribunals depend on investment protection instruments like Bilateral Investment Treaties, which are on the basic principles of International Investment Law and protect foreign investors against any disorderly activities of a host State.

In this article, we shall discuss in dept the International Center for Settlement of Investment Disputes (ICSID). A detailed analysis of how investment by individuals in foreign sates are protected, an overall operational mechanism of international investment arbitration which respect to ICSID shall be discussed. Also, this article will have a special emphasis on a grey area issue in the world of investment arbitration which is the denunciation of the ICSID convention, its cause and effects, its outcome to on the denouncing sate, on foreign investors and most important of all; its outcome the standing BITs or other investment protection treaties and the jurisdiction of the Center or the tribunal after such denunciation by states using brief case studies.

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I. INTRODUCTION

Economic, social and environmental development is incomplete without investment. In the same way, International Laws would be incomplete if the protection of investors and their investment is not provided in it. In most of the developing countries, foreign direct investment is a major source of international development capital. Investment law is largely based on the functionality of various other laws like some general principles of international law, certain standards of international economic and trade law combined together etc. and its entire foundation is based on the objective to protect and promote foreign investors.

This paper aims at giving its readers a brief introductory understanding of what is International Investment Law, its principles, the objective of the law, to whom does this law apply on and what are the forums that can be approached for the violation of these laws. This paper will also have special emphasis on the ICSID Convention which provides a facility to an investor for suing a host before an ad hoc arbitral tribunal for violations of trade and investment agreements and bilateral investment treaties. The paper also focuses on the facility and procedure of denouncing the ICSID convention provided to its member states.

II. INTERNATIONAL INVESTMENT LAW

It would not be wrong to state that the whole premise of International Investment Law in these modern times has largely or rather wholly developed in and around a treaty-based mechanism. States these days formulate an instrument for investment protection by coming to an agreement with other states. The most common examples of investment protective instruments or investment protection agreements are Bilateral Investment Treaties (BIT) and Multi-lateral Investment Treaties (MIT) which, after their formulation and enforcement act as a homogeneous set of laws for do(s) and don't(s) for both a state and sometimes an investor too for sates that come into agreement[3]

A BIT is an agreement between two states whose purpose is to protect and promote investments in the territory of the host sate (the state in which the investment is made) made by investors from the other contracting sates while furthering the development of both states.[4]

These treaties essentially are formed to protect the interests of investors who invest outside the geographical territories of their own home sates, in different state which in International Investment Law is said to be a host state given its nature of hosting foreign investments within

[3] RUDOLF DOLZER, CURRENT TREND IN TREATY PRACTICES 52.

[4] Silvina Gonzalez Napolitano, *Investment Protection Treaties- International Law*, OXFORD BIBLIOGRAPHIES, , (July 23, 2013), https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0084.xml.

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the boundaries of their state.

A typical BIT consists a definitional clause that usually defines an investment and a national of the other contracting state, a clause that give rise to the right to lawful expropriation, a protection clause which commonly consists protection in case of or against expropriation, a clause that ensures minimum standards of protection of the investors like Fair and Equitable Treatment, National Treatment, Most Favored Nation etc. They also contain a dispute resolution clause that sets up the forum to approach in case any investor faces their dispute while carrying forward their operations in a host state and also a sunset, continuation or a termination clause. Several BITs in the modern times also have umbrella clauses.[5]

In order to understand these principles of protection, their uses, purpose and their application, it is of utmost significance to see who and under what circumstances can invoke these protections in the treaty. The answer to the question is 'an Investor'. But this answer again gives rise to 3 very fundamental questions which are 1) Who is an investor, 2) What is an investment and 3) the interpretation of the definition clause and a general circumstance of both; investor and investment or any one not being defined in the definition clause of the BIT.

Answers to several basic yet important question of International Investment Law.

(1) Who is a foreign investor?

An investor can be both an ordinary person as well as an artificial or juridical person constituted or formulated for the purpose of an investment in a foreign territory or for the operations of business or even otherwise[6]. The determination of the nationality is a key aspect of determining the foreignness of the investor[7]. Also, the capital invested in an investment is not a decisive factor for the determination of existence of a foreign investor as domestic laws of a host state or certain treaty provisions may require a foreign investor to establish subsidiaries in the host nation for the principle investment to happen through or to be run by an entity which is not foreign in nature[8]

Investors in a dispute usually opt out to determine their nationality from a treaty which may benefit them. An investors dependence on a BIT to prove its nationality is only successful in the case where the investor shows that is has the nationality of one of the two state parties. Similarly, if the investor wishes to rely on a regional treaty like for instance, NAFTA, proving

[5] RUDOLF DOLZER & CHRISTOPH SCHREUER, THE PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 109(2d ed. 2012).
[6] That is why it is more appropriate for an investor to be referred to by 'it' rather than 'he' or 'she'.
[7] R Wisner and R Gullus, *Nationality requirements in an investor- state arbitration,* (2004).
[8] Tradex v. Albania, ICID reports 70, 108-111 (1995); Yaung Chi Oo v. Myanmar, 8 ICSID reports 463, 43-45 award, (2003); Tokios Tokelės v. Ukraine, ICSID Review- FILJ 205 (2005).

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the nationality of one of these sates is a must. If an investor, to prove its nationality, depends upon a convention like ICSID, it must prove that it has the nationality of one of the contracting states of ICSID. By this point, the question that needs to be addressed is, why is proving nationality of an investor necessary? The answer to the question lies in two folds. One that the standards and protection guaranteed in a treaty will only apply to relevant nationalities i.e. the parties between whom the agreement is made. Second, the jurisdiction of an international tribunal is determined, inter alia, by the nationality of the claimants[9].

While talking about artificial legal personalities, principles and practices of international law have well established multiple number of determinants of nationality of a corporation. The most widely used factors for this determination by various international tribunals are the place of incorporation or regional office. Also, in case of establishment of special purpose vehicles or subsidiaries, the place of central administration is taken into consideration[10]. Moreover, what's also notable is that more or less maximum states in their BITs define an investor as "any corporation, firm, organizations and associations incorporated in or constituted under the laws in force in that Contracting Party." Or "an enterprise constituted or organized under the laws of a party."[11]

Therefore, the question of who is a foreign investor can be answered by obtaining an understanding of an investment which is made by a foreign entity, whose nationality does not depend on the origin of capital that it injects in the investments but depends upon the treaty which it is relying upon for its nationality.

(2) Concept of Investment.

An investment per say, for a very long period of time in the regime of both Public and Private International Law did not have any set definition. International tribunals always considered a test for this determination. The activities of a particular venture, in the early days of Investment law, must have been (1) a long-term project, (2) funds must have been transferred, (3) there must have been regular income, (4) the person who invested the capital (transfer of funds) must have been involved in the management under some capacity and (5) there must have been risk to carry out the business. This test was conjunctive in nature and therefore, a venture needed to qualify all the parameters of the test in order for it to qualify as an investment in an

[9] DOLZER, *supra* note 3, at 10 .
[10] Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5 (2001); Société Ouest Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB/82/1 (1988).
[11] BIT between Poland and UK; The US model BIT.

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International Tribunal. These norms in the test ruled out the possibility for the venture being of a short while or just a mere subsidiary and not yielding any income.

Later on, the ICSID convention under Article 25 defined the term investment for various tribunals to rely on an authoritative source of definition to adjudge matters of jurisdiction and admissibility.

After the ICSID convention laid down the definition of an investment under Article 25, the Tribunal in its decision on jurisdiction of the *Fedax* dispute[12] gave a set of four guidelines which were a shortened set of norms from the *Salini v Morocoo* were. According to this, in order for a claimant to prove investment these norms were clearly at par with and in shrink with definition given under Article 25 of the convention. The four guidelines that were laid down by the tribunal were 1) the venture must be long term, 2) capital must be invested, 3) a foreign seat of administration or management and 4) Risk must be there.[13]

(3) Protection provided to foreign investors by International Investment Law.

Protection of foreign investors generally depends upon the terms of the treaty which they are bound to. Broadly, these protections like Most Favored Nation, National Treatment, Fair and Equitable Treatment and others are adopted from various principles of international law, international trade and economic laws etc. The following are some definitions for a better understanding of the general principles of protection that are more or less included in every BIT or investment protection instruments:

- Fair and Equitable Treatment-

It is a part of the minimum standard required by customary international law. Under customary law, foreign investors are entitled to a certain level of treatment, and nay treatment which falls short of this level, gives rise to responsibility of the state and acts as a deliberate choice of a state to violate customary international law.[14]

- Protection Against Expropriation-

This protection which is granted to investors, ensures that the no government acquires the property, the entire business or disrupt the venture of the foreign investor in the investment made. Also, what's important to understand is that this protected does talk about or ensure a blanket protection from a state acquiring private foreign property. A number of tribunals have

[12] Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3 (1997).
[13] Alex Grabowski, *The definition of investment under the ICSID convention: A Defence of Salini*, 15 Chicago Journal of International Law (2014).
[14] *Fair and Equitable Treatment Standard in International Investment Law*, 2004/03, OECD Publishing,(2004).

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concluded that a state can and will acquire private foreign property in case of absolute public necessity and emergencies like an environmental crisis or a public health emergency.[15]

- Most Favored Nation-

Although, the name of this protection, to a lay man may sound like a clause or a protection of one single country or just a special group but is not so in reality. This protection policy had been enforced in a long list of trade agreements and is adapted into International Investment Law from the field of International Trade Law. This protection ensures that all countries in an agreement or all parties from the countries in the agreement get the same amount of protection.

- National Treatment-

This protection to foreign investors is born out of the field of International Trade Law and it essentially means that states will not treat domestic parties and foreign investors any differently from each other. Every investor, weather domestic or foreign will be treated as a national of the host sate itself.

- Umbrella Clause-

This clause protects investments by bringing obligations or commitments that the host state entered into. Umbrella clauses are usually written broadly to cover contributable obligation of the host state.

Even after the protective provisions and other set of rules and regulations provided under BITs and MITs, there remains a possibility of conflicts and disputes between the investors and host states. Mostly, the method and forum for resolving the disputes is pre-decided among the parties. If not, it remains a debatable issue for the times when dispute arises. International Law through International Centre for the Settlement of Investment Disputes (ICSID) or The United Nations Commission on International Trade Law (UNCITRAL) and various other forums allows an investor to sue a host state for violations of bilateral investment treaties or trade and investment agreements. ICSID is widely and most commonly approached forum for dispute resolution. We will discuss about the establishment, development and procedures under ICSID conventions in upcoming sections.

III. THE ICISD CONVENTION

The Executive Director of the International Bank for Reconstruction and Development[16] formulated the convention. The International Center for Settlement of Investment Dispute (ICSID) is established by the convention on Settlement of Investment Disputes between States

[15] *Policy Framework for investments*, Expropriation laws and review process, Investment policy, OECD.
[16] Popularly known as the World Bank.

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and Nationals of Other States.

The International Center for Settlement of Investment Dispute was initially ratified by 20 countries and entered into force on October 14, 1966. The convention now stands ratified by the 154 contracting states[17]. In this postmodern world, the convention's objective is to protect the best interest of the foreign investors, to settle disputes of investors who invest in foreign states *i.e disputes* between sates and nationals of other contracting states.

The preamble of the ICSID convention sets forth the premise of the entire conventions and narrates certain major aspects, reasons and goals for the formation of the convention.

Countries that are party to the convention have essentially agreed to the fact that considering the need for international cooperation for economic development and the role of private international investors is the key to economic prosperity, keeping in mind that during the course of investment, certain disputes may arise that cannot essentially be adjudged in a domestic court room given the nature of the disputes. Also, all countries have agreed upon the promotion and protection of foreign investors and recognized the fact mutual consent by the parties to a dispute for conciliation or arbitration as facilitated in the convention and additional facility rules is of utmost importance in order of an investor state dispute settlement.

The Center's Jurisdiction.

Being a party to the ICSID convention is not the only criteria for consent of the state for arbitration. The consent which is referred in Article 25 (1) of the convention can be traditionally given in an arbitration clause, in an ISDS clause in an investment protection treaty. The consent for the arbitration can also be given separately. In either of the cases, even if a dispute is filled with a tribunal during the six months period laid down in the article 71 of the convention, and consent has been given by any of the above specified means, the center will have jurisdiction to adjudge the dispute.

IV. DENUNCIATION OF THE ICSID CONVENTION.

In this postmodern world, the convention's objective is to protect the best interest of the foreign investors, to settle disputes of investors who invest in foreign states *i.e disputes* between sates and nationals of other contracting states. Along with the freedom to sign and ratify the ICSID Convention, signatory states have the right to terminate or denounce the convention at any time. The ICSID Convention regulates the withdrawal of States Parties in Articles 71 and 72.

During the melt down of the Alternative Bolivariana para la América Latina El Caribe (ALBA),

[17]https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx. Official ICSID page.

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Bolivia on the 2nd of may 2007 became the first state to submit their notice of denunciation to the depository with accordance to the Article 71 of the convention[18] followed by Ecuador and Venezuela.

The denunciation by the above mention sates presented and seemed to continue a new expression of hostility towards international investment arbitration, and various types of investment protection treaties that were entered into sates for the promotion of protection of investments made by foreign investors. The whole outset posed a threat to the investment environment.

The Right of Denunciation, relevant provisions and its consequences

The Vienna Convention on law of treaties under Article 54 provides that " the termination of a treaty or the withdrawal of a party may take place by; (a) in conformity with the provisions of the treaty; or (b) at any time, by the consent of all the parties after the consultancy with contracting sates and organization. Also, Article 56[19] sheds light upon the scenario where there is absence of a denunciation, termination or withdrawal provision and expressly states "a treaty is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal or (b) a right to denounce or withdraw may be implied by the nature of the treaty."

The ICSID convention itself is well equipped and have two dedicated provisions for the denunciation or the withdrawal of a party from the convention. Article 71 of the convention is the provisions of the convention which allows or grants the parties of the convention a right to denounce or withdraw from it. It provides that "Any contracting sate may withdraw from the convention by a written notice to the depository[20] of the convention. The denunciation shall take effect six months after the receipt of such notice."

All three denouncing states *i.e Bolivia, Ecuador and Venezuela* had submitted their notice to denounce the convention to the depository of the convention in accordance with Article 71 of the convention and very soon the focal point of discussion did not remain confined to if a state can denounce the convention or not but rater, what are the consequence of denunciation of the convention by the sates, will the convention fail to provide protection to foreign investors and investment as par its objectives of enforcement, will investor have to face a hostile environment to invest on foreign lands. Also, another critical question that was to be addressed was if the

[18] KARL P. SAUVANT, Bolivia submits a notice under Art 71 of the ICSID Convention, ICSID news release, (2007).
[19] Vienna Convention on the law of treaties, Art 56(1), (1969).
[20] International Centre for Settlement of Investment Disputes (ICSID) Convention, Art 73, (1966).

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denouncing party ceases exist as a party to the convention on the very same day the notice is submitted to the depository or will the state only be considered to be an alien party to the convention after the six months period set forth under Article 71 of the convention.

The tribunal in *Blue Bank v. Venezuela*[21] relied upon the opinion of Prof. Emmanuel Gaillard who stated that after a state has given a notice of denunciation and such notice has taken into effect it ceases to be a party to the ICSID convention. Though the tribunal in the case did not recognize its jurisdiction to adjudge the dispute, it made it very clear that the denouncing state did remain a party to the convention at the time the claimants sent in their request to arbitrate the dispute just a few days prior to the laps of the six period after the submission of the notice to denounce the convention.

After the six months period comes to an end, the party ceases to be a contracting sate to the convention and therefor no longer has any right that the center provides and is also no liable for any responsibilities of the center. Also, it was ascertained by various scholars that's the six months period set forth under the article is for the denouncing state to surrender all their rights and immunities of the center and also to render all pending liabilities against the center and other investors which includes going through with the enforcement of pending awards by various other ICSID tribunals.it was also opined on the same basis, the party cannot be bound by new obligations of the center.

However, one very significant question which still remains unanswered is about what happens to the existing obligations of the denouncing states. This very same problem of a denouncing party's existing obligation was foreseen by the drafter of the ICSID convention and that is why the wise drafters apprehended this problem and inculcated Article 72 of the convention which dealt to wrap a situation wherein a denouncing state or any of its sub divisions or agencies, has consented to the jurisdiction of the center prior to the notice of denunciation. Article 72 narrates:

"Notice by a contracting state pursuant to article 70 and 71 shall not affect the rights or obligations under this Convention of that state or of any of its constituent subdivisions or agencies or any national of that contracting sate arising out of consent to the jurisdiction of the center given by one of them before such notice was received by the depository."

The article very clearly narrates that pursuant to this provision, the withdrawal of a state from the ICSID does not affect its obligation under the convention if it has given consent to the

[21] BLUE BANK INTERNATIONAL & TRUST (BARBADOS) LTD. V. BOLIVARIAN REPUBLIC OF VENEZUELA, ICSID CASE NO. ARB 12/20 (2017).

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jurisdiction of the center before it gave its notice to denounce the convention. This provision ensures that states that are party to the convention do not unilaterally frustrate the effectiveness of existing rights and obligations by withdrawing from the convention and is entirely in conformity with the customary rule of international law. Article 70(1) of the Convention on law of Treaties narrates that until and unless a treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present convention: (a) releases the party from any obligation further to perform the treaty; (b) does not affect any rights, obligations or legal situations of parties created through the exclusion of the treaty prior to its termination."

Since the only right and obligation of the denouncing party post their denunciation is their consent for the jurisdiction of the center, this obligation and any other right in relation to this obligation, in ways mean that the derogation contained in Article 72 maintains its status as a contracting party. The whole narrative of "consent to the jurisdiction of the center" is thus at the heart of this derogatory regime

V. CONCLUSION

The key premise of this new investment system has been to provide rights to international investors without entering states into privity with them. International arbitration under ICSID conventions are at the heart of this paper. As conclusively evidenced by the provisions under International law, investment treaties bestow rights on international investors.

The termination of investment treaties or conventions gives rise to problematic questions. On one hand, it comes out as a classic weapon of the state wishing to escape the regulation of international law. On the other hand, investment protection treaties were precisely set up to create a stable and quasi-permanent system of protection for investors.

The paper has shown that the most appropriate conception of investment law treats the commitments of host states as almost unilateral acts made directly vis-à-vis the investor. This approach takes investor's right seriously. Though the relationship of investors and host state is not unilateral but of privity, where both are bound by certain obligations defined by the agreement between them, which is formed in accordance with Investment law at domestic as well as international level.

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 [ISSN 2581-5369]