Journal of Advances in Developmental Research (IJAIDR)
E-ISSN: 0976-4844 ● Website: www.ijaidr.com ● Email: editor@ijaidr.com

THE EMPIRE OF INVESTMENT: GEOPOLITICAL DYNAMICS IN INTERNATIONAL INVESTMENT LAW

Shilpa Khandelwal

Assistant Professor
Modi Law College
Kota, Rajasthan.

Abstract:
Investment arbitration is inherently geopolitical, offering alternatives to resolving overseas investment disputes traditionally handled through host government courts or diplomatic protection. The latter often entails significant diplomatic compromises. Public international law treaties form the procedural and substantive frameworks of investment arbitration, significantly impacting the investor's autonomy and host state's laws. The jurisdiction of arbitral tribunals is consent-based, defined by investment treaties, domestic laws, or specific arbitration clauses. Investment arbitration bypasses the need for investors to seek their home government's intervention, enhancing their independence in disputes with host states. This arbitration form has grown in acceptance, offering protections like fair treatment and safeguarding against discriminatory expropriation, fostering the rule of law internationally. Despite its benefits, investment arbitration faces opposition, especially from developed nations, due to perceived encroachments on national sovereignty and policy priorities. The COVID-19 pandemic has heightened these concerns, as emergency health measures are challenged under arbitration clauses. The reputational risks of arbitration claims can deter investment, challenging the cost-benefit rationale of adopting investment arbitration. Investment legality, national treatment standards, and the impact of arbitration claims are pivotal in these disputes. Tribunals consider the gravity and timing of legal violations, the investor's awareness of such violations, and whether discrimination against foreign investors occurred. Ultimately, the decision to accept investment arbitration remains a complex political choice, weighing economic benefits against potential sovereignty and policy costs.

Keywords: Arbitral Tribunal Jurisdiction, Investor-State Disputes, Bilateral Investment Treaties (BITs), Fair and Equitable Treatment, Discriminatory Expropriation.

INTRODUCTION

One notable aspect of investment arbitration is its inherent geopolitical dimension. Historically, in the context of overseas investment disputes, there were only two primary avenues available: suing the host government in its own courts or invoking diplomatic protection. The latter option typically involves approaching one's own government to take diplomatic actions aimed at securing reparations from the alleged offending party[1]. However, governments are often reluctant to jeopardize their international relations by pursuing such claims, leading to significant compromises when advancing an international claim.

In investment arbitration, public international law treaties establish the fundamental framework. Procedurally, mandatory provisions of national law are only significant if the arbitration is not governed by treaties like the International Centre for Settlement of Investment Disputes (ICSID) or the North American Free Trade Agreement (NAFTA) and is instead governed by non-governmental organizations such as the London Court

[1] Katia Yannaca-Small, Arbitration under International Investment Agreements (Oxford 9 University Press 2010) at p. 107

of International Arbitration (LCIA) or the International Chamber of Commerce (ICC)[2]. Substantively, the national law governing investment treaties is typically the law of the host state. This implies that investors are subject to any future changes in the state's domestic law. Such changes can be contentious, especially if they result in a breach of the Bilateral Investment Treaty (BIT) and fail to protect foreign investors, as evidenced in Indian cases like Vodafone (2017) and Cairn (2016)[3]. The jurisdiction of an investment arbitral tribunal relies on the consent of the Host State (ratione voluntatis), which is provided through investment treaties, domestic laws, or arbitration clauses within investor-state agreements. The extent of the tribunal's jurisdiction is defined by four types: Ratione Voluntatis, Ratione Personae, Ratione Materiae, and Ratione Temporis[4].

CHALLENGES IN THE INTERNATIONAL ARENA

Investment arbitration effectively circumvents these issues by offering various forms based on consent. Notably, the investor's right to initiate arbitration is subject to contractual, treaty, and legislative limitations. Crucially, this process does not require the investor to seek intervention from their own government. Instead, the investor retains the right to arbitrate independently in their own name, thereby eliminating the investor's state from the proceedings and granting the investor an autonomous right to arbitrate against the host state.

INVESTMENT ARBITRATION HAS DISTINCT SOCIAL AND POLITICAL IMPACTS

Recently, it has become more frequent and continues to garner admiration and support from many sectors. This form of arbitration allows a private investor to sue a foreign government. It serves as a remedy when host states cannot ensure the rule of law, effectively filling that void. A government cannot avoid responsibility by claiming its courts have deemed certain abuses against an investor to be lawful. Investment treaties provide substantive protections such as fair and equitable treatment, full protection and security, and safeguards against discriminatory expropriation.

This arbitration significantly advances the rule of law in international affairs. Initially, discontent with this arbitration was mostly confined to less developed countries, but over time, politicians in developed nations have also started questioning it[5].

When examining why there is a growing opposition to investment arbitration, we must consider whether the issue is more about perception than substance. Recently, developed nations have become targets of such claims, surprising many who have learned that investment treaties allow panels of arbitrators—unfamiliar to the public and not accountable to any national parliament—to issue awards that seem to question a state's freedom to manage its own affairs. Emergency health measures adopted in response to the COVID-19 pandemic are likely to be challenged by investors invoking the arbitration clauses of bilateral investment treaties (BITs)[6]. Investment arbitration is included in trade agreements that correlate with the challenges faced by those regions. Unsurprisingly, investor-state dispute settlement (ISDS) has come under scrutiny from trade unions and political leaders across the old industrial heartlands. When considering less developed nations, this form of arbitration appeared to single them out as targets of investor suits. Although investment claims are not one-sided—many developed countries have also been sued under investment arbitration agreements—the awards often went against less developed countries, leading to perceptions of discrimination. This has

[2] Karl-Heinz Bockstiegel, Commercial and Investment Arbitration: How Different Are They 3 Today? 28(4) Arbitration International, 787-792

[3] Karl-Heinz Bocksteigel, "Commercial and Investment Arbitration: How Different Are They Today?" Arbitration International, The Journal of the London Court of International Arbitration (2012) UNCTAD Investment Policy Hub (2019), Investment Dispute Settlement, Vodafone v India (II) 2017, Available on: https://investmentpolicyhub.unctad.org/ISDS/Details/819

[4] Michael Waibel, Investment Arbitration: Jurisdiction and Admissibility, Legal Studies 8 Research Paper Series- University of Cambridge (Paper No. 9/2014)

[5] Michael Waibel, Investment Arbitration: Jurisdiction and Admissibility, Legal Studies 8 Research Paper Series- University of Cambridge (Paper No. 9/201)

[6] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd 5 ed., 2020) at p. 33

caused discontent about the seemingly disparate impact on different parts of the world[7].

Undoubtedly, agreeing to investment arbitration is a steep price to pay for a non-binding promise to avoid interventions that would already be illegal. A study[8] by Srividya Jandhyala of ESSEC Business School in Singapore, Geoffrey Gertz of the Brookings Institution in Washington DC, and Lauge Poulsen of University College London confirmed that consenting to investment arbitration might once have been a form of self-defence for weaker states. However, there is no evidence that it serves any defensive purpose today.In today's world, investment arbitration boosts economic growth by offering foreign investors a reliable legal procedure[9]. This assurance means investors do not have to worry about the dependability of local courts. By protecting foreign investors in this manner, governments that agree to arbitration are more likely to attract foreign investment[10]. Consequently, investment arbitration draws in foreign investors, who in turn help to stimulate the economy. While agreeing to investment arbitration incurs costs, it diminishes the authority of domestic institutions, including the courts, and imposes substantive rules that may conflict with public policy priorities. Deciding whether to bear these costs depends on each society and is a political decision. However, accurately quantifying the costs and benefits makes it challenging to make a well-reasoned decision about the cost-benefit relationship[11].

In international investment arbitrations, another vital aspect would be regarding the illegal investments and violation of host state law. In situations where there is uncertainty, a tribunal may opt to consider the issue of illegality when assessing the host State's adherence to substantive standards, rather than rejecting investment protection outright. This method is also suitable for cases where the illegality is not immediately evident. When illegalities occurred during the investment's performance, tribunals did not deny access to substantive standards[12]. Instead, they determined that the State's actions concerning the investment did not violate these standards. This held true regardless of whether the activity itself was illegal or the manner of the investment's operation was illegal. It's evident that not every minor infraction results in the denial of investment protection. Only breaches of fundamental legal norms will have such an effect. The significance of the violation of host State law will be the key factor in deciding whether the investment's legitimacy as a whole is compromised. Occasionally, the severity of the contravention alone will not clearly distinguish between cases where investment protection should be denied and those where it should be upheld[13].

But certainly there are some elements considered by the tribunal in the said situations like[14], the gravity of the contravention of host state law, The significance of the unlawful arrangement to the investment's profitability can help determine whether the entire investment project lacks legitimacy. This factor can support the decision

[7] Karl-Heinz Bocksteigel, "Commercial and Investment Arbitration: How Different Are They Today?" Arbitration International, The Journal of the London Court of International Arbitration
[8] Aniruddha Rajput, Protection of Foreign Investment in India and Investment Treaty 17 Arbitration (Kluwer Law International 2017) at pp. 171, 194
[9] Christoph Schreuer, Investment Arbitration in The Oxford Handbook of International 5 Adjudication (C. Romano et. al. ed.) (OUP, 2013) at 295
[10] Tanaya Thakur, 'Reforming the Investor-State Dispute Settlement Mechanism and the Host State's Right to Regulate: A Critical Assessment' (2021) 59 IJIL 173; Justine Touzet and Marine Vienot de Vaublanc, 'The Investor-State Dispute Settlement System: the Road to Overcoming Criticism
[11] James Crawford, 'Treaty and Contract in Investment Arbitration' 24(3) Arb Intl 351, 36
[12] Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2". [13]"PSEG v. Turkey, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004, 11 ICSID Reports 434, paras. 106-124; Joy Mining v. Egypt, Award, 6 August 2004, 19 ICSID Review - FILJ 486 para. 54 (2004) (but see the apparent contradiction with the Tribunal's statement at paras. 42, 44)
[13] Andrea Carlevaris, The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals, 9 The Journal of World Investment and Trade 48
[14] Berschader v. Russia, Award, 21 April 2006, http://ita.law.uvic.ca/documents/BerschaderFinalAward.pdf, para. 111

to either deny investment protection entirely or consider the illegality when evaluating if the host State has violated a substantive standard[15]. The awareness possessed by the investor regarding the illegality. The most crucial aspect can also be the element of time, illegality at the time of the establishment or whether it is later on? An investment may be illegal from the start. However, it is also possible that an investment initially complied with host State law, and the violation occurred later during its operation. This could be due to a change in the host State's law during the investment's operation or a change in the investor's actions[16].

The national treatment standard aims to guarantee that the host state offers foreign investors treatment that is as favourable as that given to domestic investors. The inclusion of a national treatment clause in investment treaties is meant to prevent the host state from discriminating against foreign investors compared to domestic ones[17]. The National Treatment clause stipulates that foreign investors and their investments should receive treatment no less favourable than that given to the host state's own investors. This obligation covers both de jure and de facto discrimination, and any differences in treatment must be justifiable on rational grounds provided by the host state[18].

Further, application of investment treaty provisions themselves can sometimes broaden the scope and the content of the substantive rules governing a dispute. Some treaties contain a 'most-favoured nation clause', mandating the host state not to subject investments or investors protected under such a treaty to treatment less favourable than what the host state accords to investors of third states. If investors of third states are granted a more favourable protection under the treaty covering their investment, then the substantive provisions of such a treaty may be imported and applied in disputes based on a treaty containing the most-favoured nation clause[19]. Tribunals, for instance, have imported from other treaties more favourable conditions for just compensation or extensive obligations to provide fair and equitable treatment[20].

To succeed on a national treatment claim, a foreign investor doesn't need to prove the host state's discriminatory intent. The tribunal focuses on the impact of the host state's actions. While most Bilateral Investment Treaties (BITs) do not explicitly require proving intent, demonstrating intent in practice is necessary to show unjustifiable differentiations[21]. Tribunals hold varied opinions on whether 'intent to discriminate' or 'impact of discriminatory measure' should be the assessment standard. In the case of the latter, intent is irrelevant since practical discrimination alone is enough to establish a breach of the national treatment clause[22].

Interestingly, Japan had the world's largest investment outflow in 2018, yet it has hardly filed any investment arbitrations. This suggests that the availability of arbitration may have less influence on investment decisions than its proponents claim[23]. Research indicates that investors from countries with reliable institutions and a

[15] Faraz Alam Sagar & Samilksha Pednekar, International Investment Arbitrations and 1 International Commercial Arbitrations: A Guide to the Differences, Cyril Amarchand Mangaldas Blog
[16] Shalaka Patil and Pratibha Jain, Bilateral Investment Treaties and their Impact on the 25 Global Economy, pt 2.2
[17] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd 102 ed., 2012) at pp. 198-206
[18] United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. 103 UNCT/02/1
[19] See, e.g., CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Final Award, 14 March 2003". [21] "See, e.g., Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008; MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004
[20] Asaf Niemoj, Investment Arbitrations: Do Tribunals Take the Role of a Supra-National 15 Appellate Court above National Courts?
[21] Kenneth J. Vandevelde, The Political Economy of a Bilateral Investment Treaty, 92 Am. J. 32 Int'l L. 621, 623
[22] Doreen Lustig, From NIEO to the International Investment Law Regime: The Rise of the 17 Multinational Corporation as a Subject of Regulatory Concern in International Law in Veiled Power: International Law and the Private Corporation 1886-1981 (2020)
[23] Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2020) 23(2)

strong rule of law seek similar environments abroad, and the availability of investment arbitrations is not a major concern for them[24]. Empirical data, including examples like the French BITs, shows little evidence that signing investment treaties with arbitration clauses significantly increases foreign investment.

CONCLUSION

Thus, consenting to investment arbitration may not lead to economic growth or an increase in foreign investments for the state. In fact, the claims themselves can damage the state's reputation and deter potential investors, as arbitration can scare investment away when a claim is made against the state. Therefore, the benefits and costs of investment arbitration are not balanced. Investment claims have a negative reputational impact, regardless of the claim's outcome. This raises an important question: why do states accept investment arbitration despite its drawbacks? It could be argued that these drawbacks are general, and there may be specific circumstances where it is beneficial. Often, states only fully appreciate the risk of being subject to investment arbitration once it happens, revealing broader implications for society[25].

EJIL 377-400; Lorenzo Cotula, 'Investment Contracts and International Law: Charting a Research Agenda' (2020) 31(1) EJIL 353-68, 365

[24] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd 35 ed., 2020) at p. 68

[25] Aniruddha Rajput, Regulatory Freedom and Indirect Expropriation in Investment Arbitration 75 (Kluwer Law International 2018) at pp. 1 - 6