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“AN INTRODUCTION TO INVESTMENT TREATY ARBITRATION.”

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I. INTRODUCTION:

The world has witnessed a remarkable increase in the conclusion of agreements and treaties between States with the object of protecting and liberalising investment of foreign nationals. As per the current data, more than 2700 such investment treaties or agreements are in existence currently and most of them have been signed-in the later stage of the 20th century to the early 2000s. Out of these 2700 investment agreement, 2400 are bilateral investment treaties (BIT) signed between two States that lay certain obligations on the States for the protection of foreign investors and more than 200 agreements include trade related agreements¹. Although most of these agreements have been recently entered into, international investment can be traced back to the 18th century when provisions for the protection of properties of aliens were prevalent. Thus, protecting the interests of foreign investors is not a recent concept and has been in the international community ever since trading between States first occurred.

This rise in the conclusion of investment treaties to regulate various aspects of foreign investment is a result of the growing international trade and foreign direct investment (FDI) that has created opportunities in the world economy for developed as well as developing nations. It became important for these investment treaties to consider the problems faced by investors and the host States with a view to remove obstacles in the way of economic transactions. As a result of this, the provision for the settlement of disputes, through arbitration, related to an investment property of a foreign nations were developed which has

¹ United Nations Conference of Trade and Development Report: Recent Developments in International Investment Agreements. (August, 2015)

found its way in all investment agreements, whether bilateral or regional and has been differentiated from the inter-State dispute settlement that has been a traditional part of international law. Earlier, investors could only exercise diplomatic protection after exhausting the remedy of domestic courts of host State, in case of any violation of its rights with respect to the investment property. Diplomatic protection is deficient for the protection of investors for various reasons. First, the right to exercise diplomatic protection is vested on the home State of the investor and it may decide not to use this right as a defence against the host State on claims raised by the investor, with a view to protect its diplomatic relations. Second, the right of defence through diplomatic protection is not obligatory and the host State may not necessarily act on the claims of the investor as per its discussions with the home State. Third, not every small claim can be pursued through a diplomatic course as they could be conflicting with the agreements between the States that are parties to the diplomacy. Thus, the rise in commercial transactions related to international trade and investment by private corporations and individuals required recourse to protect the rights of these private persons against the powerful States they enter into business with.

There are various kinds of disputes that arise between a foreign investor and a host State but the common factor in all these disputes is the disagreement between both the parties related to their rights and obligations under the relevant investment agreements. These disputes may raise claims that are not related to the investment agreement for example, claims related to the failure of host States to treat investors as per the standards of international law, but these claims are usually settled through negotiations and rarely reach the litigation phase. It is in case of disputes that cannot be resolved mutually through discussions and negotiations, that the dispute settlement provision of investment treaty is the resort for investors. It is important to note that in an investment dispute, a claim can be raised only by the investors and not the host States, however the host States can raise counter claims against the investors with their reply but these counter claims have to be related to the primary claim in the arbitral proceeding. Investment treaties are primarily focused on laying down a settlement procedure with respect to serious disagreements between investors and States under the treaty. This procedure aims to offer a resolution of investment disputes with a view to overcome the disagreement between the parties and preserve the investment relationship between them. In

cases where it is impossible for the parties to continue their investment relationship after the dispute has been raised, the investment treaties try to offer adequate remedies to the investors aggrieved by the actions of the host States, by protecting their basic economic rights and recognising the legitimate expectations in their minds while entering into a contract with the relevant host State. Thus, investment treaty arbitration performs the essential function of reducing risk and increasing confidence in foreign investors to make investment transactions without worrying about the arbitrary actions of the States, thereby increasing the flow of money around the world.

II. EVOLUTION OF INVESTMENT TREATIES:

Investment treaties have evolved over the course of years to recognise the rights of investors under them and protect these rights from the wrongful acts of host States. This evolution can be traced through three phases. The first phase is the Colonial Era, which covers the period from the late 18th Century to the Second World War. The second phase, Post-Colonial Era refers to the time from the end of the Second War to the collapse of the Soviet Union in 1990. The third and the final phase includes the current period which started in 1990 with the increase in globalisation and liberalisation of world economies.²

II.1 The Colonial Era:

Most international commercial agreements signed between States before the Second World War did not provide for the protection of foreign investment. They established a trade relationship between the States and rarely contained provisions for the protection of properties owned by foreign nationals in the relevant States. For example, in the late 18th century, the United States entered into various bilateral treaties to establish trade relations under the umbrella of “Friendship, Commerce and Navigation” (FCN). These treaties provided for the protection of the properties owned by foreign nationals in the territory of a party State and imposed an obligation for the payment of compensation in case of any act by

² Kenneth J. Vandeveld, “A Brief History of International Investment Agreements” 12 UC-Davis Journal of Int. Law 157 (2005)

the State that amounted to expropriation. But these provisions were focused on the protection of properties own by the foreigner rather than the investment made by the foreign investors under the relevant treaty. During this period, protection of foreign investment was guaranteed only by the customary international law. This protection was however criticised by various scholar because it obligated the State to protect the investment according to the international minimum standards, which didn't apply uniformly and was vague.

Further, if the investment agreement did not provide for the settlement of investment disputes through arbitration, the only course left for the investors was espousal or diplomatic protection, which was no always in favour of the investors.³ This recourse was possible to the investors only when it had exhausted all the remedies available in the domestic courts of the host State. An alternative to the procedure of diplomacy to protect the interests of the investors was military actions. Often states resorted to the use of force to protect the private properties of its nationals. For example, the Roosevelt Corollary to the Monroe Doctrine allowed the American military to use force to collect the debt owed to it nationals by foreign States.

II.II The Post-Colonial Era:

The Post-Colonial Era refers to the time from the end of the Second World War to the collapse of the Soviet Union around 1990. During this phase, there were three major events that helped shape the provisions of international investment treaties to include protection of investors under them.

The first event that affected the international investment regime was the liberalisation of trade by the allies to cater the economic requirement of the world. The years during the great war and after it witnessed a severe economic depression which had to be addressed to urgently. As a result of the decision to increase trade and open up national economies, the *General Agreement on Tariffs and Trade* (GATT) was concluded in 1947 with the aim to increase

³ Gus Van Harten, "Investment Treaty Arbitration" Vol. 17 The EJIL 121-159 (2006)

multilateral agreements between States and liberalise international trade⁴. Investment was looked at separately from trade and the efforts to increase foreign investment through the conclusion of Havana Charter failed to come in force.

The second event that shaped the international investment regime was the process of decolonization after the end of the Second World War, which resulted in the creation of new States that were independent but weak economically. As these new States were possessive of their independence, they considered foreign investment and control of the means of productions by foreign nationals as a form of neocolonialism.

A fear of trade with developed countries emerged in these States because they believed it would result in economic exploitation. This fear led to the closing of economies of these newly formed States and expropriation of properties of foreign nationals present in them. They promoted the domestic production of goods and where trade relations were necessary; it was only entered into with other developing States.

The third important event was the emergence of the socialist bloc in the Eastern Hemisphere that was led by the Soviet Union. These socialist states entered into an expropriation spree of the privately held industries, including those owned by foreign nationals. They believed that an economic relation with the Western States would result in their exploitation and were advocated of the domestic regulation of the market rather than liberalisation and an open market economy. The threat of uncompensated expropriation resulted in the creation of various bilateral investment treaties by the developed nations that prevented Contracting States from expropriating the properties of foreign nationals without a lawful compensation based of the prevalent market value⁵. The first such treaty was drafted by Germany, which had lost a great amount of its foreign investment after the war. In 1959 it concluded two BITs, one with Pakistan and the other with Dominican Republic.

⁴ WTO Agreement Series, “General Agreement on Tariff and Trade 1947, (WTO Publication, Switzerland)

⁵ Kenneth J. Vandavelde, “A *Brief History of International Investment Agreements*” 12 UC-Davis Journal of Int. Law 157 (2005)

II.III The Current Era of Globalisation:

The international investment regime developed drastically after the collapse of the Soviet Union, from 1990 onwards. With the fall of the socialist markets, liberalisation of trade and globalisation of economies was considered as the way to go forward. The *World Trade Organisation* (WTO) was formed in the Uruguay Round of GATT in 1995 to overlook the objective of GATT and infuse foreign investment with international trade. The *General Agreement on Trade and Services* (GATS) was concluded by the member states of the WTO which allowed WTO with the jurisdiction over foreign investment in the service sector.

This era also witness a drastic rise in the number of BITs entered into by States. This rise was a result of the ideology of an open market that was prevalent. Many Asian countries increased foreign investment and promoted the import of goods which showed the essential role of globalization in a developing country. According to the World Bank, eight Asian economies grew at a rate that was three times higher than the growth of Latin American economies and twenty five times higher than the economies of Sub-Sahara Region, due to the change in policies that resulted in their liberalisation⁶.

The BITs entered into this era were similar to the BITs in the Post-Colonial Era in terms of their object to protect the investors; however they witness some changes due to the arbitral awards rendered by various tribunals. BITs started included provisions for fair and equitable treatment on foreign investors, clarified the extent of expropriation of investment properties by host States and modified the procedure of arbitration under the investor-state dispute settlement according to the prevalent global practice.

Further, trade and investment were viewed as compliments rather than substitutes of each other. Today investment is considered as a mean to promote international trade. Trade related agreements now include provisions of investment and they come together as a package deal for contracting States. For example, under a treaty, a States might offer to open its market to investment by foreign nationals in return of the market access for its goods and services in

⁶ World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (1993)

the other party State. Thus, the distinction between trade and investment that was prevalent in the Post-Colonial Era has now dissolved and investment provisions are present in all agreements whether bilateral, multilateral or regional⁷.

III. SALIENT FEATURES OF INVESTMENT TREATY

ARBITRATION:

Investment treaty arbitration has developed to form a separate dispute settlement mechanism unlike all other forms of international dispute resolutions. The primary object to create a different dispute settlement procedure with respect to foreign investment was to empower individual investors to successfully raise claims against sovereign states. This object could not be achieved by the international commercial law and its regulations drafted to settle disputes between individuals from different State because it did not obligate a State to act as per the awards rendered by arbitral tribunals and obligations imposed on it. This shortcoming in the international regime, to direct a State to protect the interests of its foreign investors and pay damages in case of violation of these interests has been addressed to by investment treaty arbitration and not by any other dispute settlement mechanisms.

The key features of investment treaty arbitration that differentiates it from other dispute settlement mechanisms in international law are⁸:

1. The authority of individual investors to raise claims against a State:

Under investment treaty arbitration, private as well as public investors are authorised to raise claims against a State related to any violation of their rights with respect to their investment in that State. They do not have to get these claims filtered by their home State or by any international organisation. This authority is derived from the relevant investment treaty under which the investment is made as well as from the ICSID Convention if the States are parties

⁷ Kenneth J. Vandeveld, "A Brief History of International Investment Agreements" 12 UC-Davis Journal of Int. Law 157 (2005)

⁸ UNCTAD Series on Issues in International Investment Agreements (United Nation Publication, Switzerland, 2014)

to it. In most investment treaties, States give a prospective consent to settle all future investment disputes through arbitration. This consent is general in the sense that it is not limited to any specific class of investors and waives the State's immunity of diplomatic protection under the international customary law. Further, no international tribunal such as the ICJ, is given the jurisdiction to hear investment claims by individuals against a State. Thus investment treaty arbitration goes beyond the conventional procedure on international adjudication where a State raises a claim against the other State.

2. The award of damages as a remedy for investors:

Investment treaty arbitration recognises the unlawful acts of a State against an individual unlike any other international dispute mechanism. It allows an investor to seek damages while raising a claim for the violative acts of a State which deprives the investor from his rights in the investment property. If the arbitral tribunal against which the claim has been raised, is of the view that the acts of the State violates its obligations as per the relevant investment treaty, it can award damages through a compensatory arbitral award in favour of the investor. Thus, the award of damages by arbitral tribunals is a public law remedy and a key feature of investment arbitration. No other branch of international law, for example environment law or international humanitarian law, recognises the award of damages as a remedy for the unlawful acts of the States. Further, even the international organisations such as the World Trade Organisation do not recognise the right of individuals to raise claims against a State to seek compensation for the violation of their rights.

3. The enforcement of International Awards:

Under the conventional international law, the decision of a foreign tribunal is not automatically enforced in the State against which the decision has been rendered. A foreign national has to approach the domestic court of the State and seek its order to enforce this decision of a foreign tribunal. However, in practice most domestic court decline to enforce a decision against its home State due to sovereign immunity or non-justiciability. Under investment treaty arbitration, the investor does not have to always move the domestic court of a Respondent State in order to enforce an award against it. The ICSID Convention provides

for automatic enforcement of arbitral awards render by tribunals formed under its rules.⁹ Therefore, all States that are party to the Convention also agree to enforce all ICSID arbitral award under it. The enforcement of awards renders in a non-ICSID arbitration is governed by the New York Convention¹⁰. This convention obligates all 165 States that have signed it, to enforce awards rendered by arbitral tribunals in any of its member States. If any State does not abide by the provisions of these conventions, they can be pressurized by the international community, the investor's State or any other member of the Conventions. Further, most investment treaties incorporate a provision for the enforcement arbitral awards, guided by the ICSID rules or the UNCITRAL Arbitration rules. Therefore, if any party State in such treaties refuses to enforce an award against it, the investors can seek enforcement in their domestic courts as per the obligation imposed through the relevant investment treaty.

Earlier, there were limited remedies for foreign nationals in case their properties were seized by host States such as the course of diplomacy. States have often initiated military actions to protect commercial interests of their nationals. However, it is not a feasible option at all times. Foreign investors had two other recourses besides the above mentioned extreme measure: either move the domestic court of the host State in order to seek relief against its decision of seizure or convince their own government to raise their claim before the host State in an inter-state dispute settlement system. Both these options have been rarely proved to be successful in the past. This made the investor-state dispute settlement (ISDS) system a simpler and peaceful procedure, as compared to its predecessors for the investors to raise their claims and emerge victorious against a powerful opposition.

As ISDS proved to be a better alternative and a new solution to the problems of investors, States started including provision of dispute settlement between investors and States in their investment treaties in the early 1960s, with an object to attract foreign investment in high numbers. Ever since then, ISDS provisions are common to all investment treaties and have been termed as their backbone by many jurists. The United States of America has been an

⁹ Article 54(1) of the ICSID Convention

¹⁰ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10th June, 1958.

advocate of the system since the 1980s. The first investment treaty, entered into by the US with an ISDS provision was the *US-Panama BIT* (1982). As the number of investment treaties has increased over time, the use of the ISDS procedure by investors to raise claims against State has also been increasing at a high rate. The ICSID has provided a date which specifies that from 1972 to 1996; almost 39 investment claims were raised by the investors with the ICSID. The number increased from 1997 to 2015 to 511 investment claims. This number incorporates the ICSID disputes only and not the claims raised before a tribunal formed under the UNCITRAL Rules.

The object of the research is to analyse the evolution of the dispute settlement system between the investors and the States and the development of various concepts through awards rendered by arbitral tribunals over the course of years. It deals with the procedure of the tribunals to hear claims raised by these investors that have developed with the opening of economies around the globe to increase foreign trade and investment. Investment related disputes are largely catered by two forums, the International Centre for the Settlement of Investment Disputes between States and nationals of Other States formed under the ICSID Convention and the Model Law on International Commercial Arbitration laid down by the United Nations Commission on International Trade Law (UNCITRAL) which is a subsidiary of the United Nations General Assembly.

With the increase of investment transactions and disputes, the law on expropriation of investment properties by host States has become clearer. Tribunals have laid down various essential requirements that are necessary for the States to observe to make their expropriating act legal. The research has, in detail, covered the prevalent law on expropriation by differentiating its various forms and citing case laws that act as its source. Further, the increase in international arbitration has led to a bias by arbitrators. This bias depends on various factors covered in the relevant chapter and has a great effect the on subsequent arbitration proceedings. Investment treaty arbitration is considered as an international branch of the administrative law that governs the system of States, rather than a typical commercial arbitration. This is because the current status of investment arbitration has been established by the sovereignty of States with a purpose to resolve those disputes that arise from the

actions of public authorities. These disputes that form the subject matter of investment arbitration occur between a State and an individual who is subject to the actions of the public authorities in that State. Thus the regime of investment arbitration has to be distinguished from the form of adjudication that is reciprocal and is used in conventional international law to settle disputes between States or disputes between private parties that are commercial in nature. It differs from these forms of disputes because investment arbitration regulates the relationship between States and foreign individuals; therefore the parties are not juridically equals.

The arbitral tribunals formed under investment treaties review the actions of the States and regulate their conduct therefore they should be considered as semi-autonomous adjudicative bodies of international law. They are international as they derive their authority and scope from international investment treaties. They are semi-autonomous and their conduct is not supervised by any court. These tribunals are given the power to check the actions of States and their public authorities against individuals, similar to the powers of the domestic courts. The only difference being, these arbitral tribunals function at an international sphere whereas domestic courts have jurisdiction within their national territories.

Investment arbitration is a unique form of dispute settlement because unlike other settlement systems, a tribunal formed under the law of one State, as per its investment treaty, has the authority to settle a dispute which involves another State or its nationals.¹¹ As a result of this quality, investors are able to raise and enforce international claims under a relevant investment treaty.

Thus investment treaty arbitration can be distinguished from other systems of international dispute resolutions for the following reasons:

- *It is the only dispute adjudicating system that allows individuals to bring international claims against to State to restrict their actions.*

¹¹ David Collins, *An Introduction to International Investment Law* (Cambridge University Press, United Kingdom, 2017)

- *It allows individuals to bring such claims against States without exhausting the remedies available in the domestic courts of these States.*
- *It allows tribunals to hear claims with respect to the actions of States that are sovereign in nature.*
- *It grants a precise remedy to the investors in form of damages or compensation.*
- *The awards rendered by arbitral tribunals in investment arbitration are internationally enforceable against the assets of the Respondent States.*

IV. CONCLUSION:

To sum up, the evolution of international dispute resolution mechanism to form investment treaty arbitration filled the required gap in the international community to recognise the violation of economic rights of individuals by sovereign States. As diplomatic protection is not a remedy available in all cases, investment treaty arbitration allows investors to make foreign investment without fearing from the powerful States and their arbitrary actions. However this dispute settlement system is not perfect and has been criticised by many scholars and jurists.

The lengthy arbitration proceedings deprive investors of immediate relief from the actions of hosts States. These arbitrations are very expensive and therefore only multinational corporations are able to raise claims against State. Further, concerns have been raised with respect to the independence of arbitrators in investment disputes that side with a party for the purpose of repetitive appointment.