A PROLUSION TO INTERNATIONAL INVESTMENT LAWS

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Review

With the growing interdependence among the economies of the world, it has become an imperative task to have a good knowledge about international investment laws. The paradigms of investment are changing on a regular basis, in order to understand how different states of the world come together and invest in the resources of other states in order to benefit its own interest, one has to have a thorough understanding how the system of investment works, both from economic and legal point of view.

The structure of international investment law is framed around 3 basic components: a.) Investor State, b.) The host state, and c.) The investor. The investor state and the host state enter into treaty giving the investor an opportunity to use the resources of the host state. Since the inception of international investment law in the 18th century, it has gained prominence and is demanding to become a part of public international law.

The discourse is divided into 4 parts. Part I brings forth the development of international investment law and the instruments involved in it (chapters 1 to 5). Part II Expropriation (chapter 6). Part III Protection Standards of the investors and Involvement of the State (chapters 7 to 9). Part IV Dispute settlement mechanism (chapter 10).

The sovereign powers of state is the paramount weapon which the states use whenever there is a dispute, but are these powers act as carte blanche? Certainly, not. There is a constant tussle between the investor and the host state relating to public welfare. The discourse will help us understand the intricacies of international investment law and the mechanism thereof.

PART I

The history of international investment can be traced as early as the 18th century. Since, then it has evolved to become one of the most important aspects of International Law. The major development took place in the era of post-world war II. When, the countries got liberated after the war, many of them decided to become open economies, then was the time when International investment law gained momentum in its development. With the passage of time, things like minimum standard of protection to the investor, and other such concepts became sin qua non to the laws (chapter 1).

Investment Laws are based on treaties therefore, it becomes imperative to have a standard formula for interpretation of these treaties, as it is ultimately going to affect the general public. Now, the problem is, if interpretation of anything is a subjective concept. Keeping, this into consideration, the most important and recognized method of interpreting any treaty between states is with the help art.31 and 32 of the Vienna Convention on the Law of the Treaties, 1969 (VCLT). Though a substantial importance given to precedents as well (chapter 2).

Two of the most important components of International Investment Law are the *Investor* and *Investment*. Despite of their significance, surprisingly there is no straight jacket definition of these 2 terms. The preference is given to the interpretation enshrined in the treaty itself, when it is difficult to interpret it; precedents play an important in defining the same (chapter 3).

The activities in furtherance of the investment treaty are done through investment contracts. These contracts are entered into by the host and the investing state. There are many important components of the same. The most important among the components is the *applicable law* to the contract. It means which country's substantive law and procedural law will govern the investment contract. This is decided on a case-to-case basis (chapter 4).

The era of late 1900s saw the growing international consensus that economic liberalism promised more growth and innovation than economic protectionism within closed national or regional borders. With this the states become open towards the cross-border investment. Now, there was a need to have a model upon which investment could take place, instead of having a uniform model, the discretion to adopt or formulate a model of investment was given to the states. Even though the states have discretion, there are certain standards that they have to observe no matter what the circumstances are. These are mainly related to protection of the investor. (chapter 5).

PART II

"Expropriation", literally it means taking away of property or investment. This single term form the axis upon which the international investment law revolves. It is most important aspect of investment law. Every host state has the inherent right to expropriate the investment of the investor. This is for the reason that, a State is sovereign and the investment has taken place in its territory and it is the host state's resources which are being used to make profits. Having said that expropriation is the right of a state, it has to observe certain criteria before it can go ahead with expropriation. These are – a.) Definition of investment, b.) Definition of expropriation, c.) Circumstances under which expropriation was carried out, as per the investment treaty. Expropriation can be justified, as it is not illegal *per se*. It can only be justified if: 1.) it is done for the public purpose, 2.) not arbitrary or discriminatory , 3.) due process of law was adhered to, 4.) prompt and adequate compensation.

Expropriation is divided into 2 types *Direct* and *Indirect*. The recent trend regarding expropriation is that, even substantial deprivation in the use of investment will also amount to expropriation. Now, the problem is, in many cases it is confused with the "controlling" measure of the host state, there is very a thin distinction between the two. However, it is highly subjective and is decided on a case-to-case basis (chapter 6).

PART III

As already highlighted, the international investment law is tilted towards the investor and investment protection, how it does so, will be elucidated as follows: *Fair and equitable treatment*: it is a necessity for the states to include a fair and equitable treatment clause in the treaty. It is followed as customary international law. An interesting thing to note about this is that, it does not have a universal definition; every treaty defines it differently. It is highly, subject to interpretation and a plethora have been used to explain the name. *Full protection and security:* protection here means physical protection to the asset against encroachment by state organs or private acts and security means legal security of the due process of law. Apart from these, the important concepts involved in protection are explained, such as: *Umbrella clause; Access to Justice; Emergency, necessity, armed conflict and force majeure; National treatment; Most favored nations and lastly, Transfer of funds*. All these concepts with their application in actual scenario have been explained in a comprehensive manner (chapter 7).

When it comes to customary international law, a state can be held responsible for all its organs be it judiciary, executive or the legislature. The role of International Law Commission Article (ILC) of state responsibility becomes highly important when there is a need to affix responsibility upon the state which is party to the treaty. The acts of any organ of the state can be attributed to the state directly. Apart from attribution of any act, it is the responsibility of the state to protect the investment against illegal acts. If the host fails to do so, it will bear the responsibility for the same (chapter 8).

The political scenario of any state keeps on changing frequently, the govt. of the states keep on changing, in order to avoid any kind of adverse impact on the investment made by the investor "Political Risk Insurance" is used. It is a kind of insurance contract whereby, the host state and the investor submit themselves to an international organization like Multilateral Investment Guarantee Agency (MIGA) (Chapter 9).

PART IV

With Investments comes "Disputes". It is absolutely necessary to have a robust mechanism of dispute resolution. Somehow, over the years Arbitration has become the primary and (mostly)

only mechanism of dispute resolution arising out of investment. Under the regime in International Investment Law, the discussion is focused on *investor v state* disputes not *state v state*. The generic problem in investor-state dispute is that, the courts of the host country mostly decide in favor of the host state for obvious reasons. Before entering into the intricacies of the dispute settlement mechanism, it is paramount to define what a "dispute" means. ICJ in the case of *East Timor*[1] defined dispute as "a disagreement on a point of law or facts, a conflict of legal views or interests between the parties".

The dispute should be a legal dispute not a factual one. Once it is confirmed that, a dispute exists, the role various forums like ICSID, Permanent Court of Arbitration, London court of Arbitration, International Chamber of Commerce, etc. come into picture. Their role is to resolve through Arbitration. The awards given by these forums is binding on the parties and act as *res judicata* (chapter 10).

The authors of the book are very celebrated personalities in the domain of Investment law, they have decades of experience in the field and are eminent jurists. The book contains a very comprehensive and detailed explanation about each and every aspect. The book at certain instances falls short of explaining a few concepts in full, e.g the MFN clause. However, he students in particular can benefit a lot form the book as it largely manages to answer the queries that arises at the first instance when one reads something new. The authors have highlighted every major principle of International Investment and also have justified the context very precisely by dividing the book into chapter and each chapter explaining a different concept. Its reading shouldn't be restricted only students; even the academician, professional or an enthusiast could read the book and yield a good understanding about the basics of International Investment Law.

[1] (1995) ICJ Reports 89