INVESTOR PROTECTION AND BILATERAL INVESTMENT TREATIES - AN OVERVIEW OF THE MAIN PROVISION[1]-

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Abstract

The objective of the study is to make an overview of main the standards of treatment afforded to investors and investments under and bilateral investment treaties. We will look at international treaties, legal writings and judicial sources (arbitral awards) in order to establish the most common standards of treatment to be found in BITs. The study will aim to provide a clear analysis of different provisions contained in investment treaties, in reference to the standard of national treatment, fair and equitable treatment, most favor nation clause and the expropriation clause. Considering that international treaties are an integral part of the national legislation of Romania, the study hopes to offer some guidance to national organizations and institutions on how to negotiate, interpret and apply the standards of protection contained in Investment Treaties

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JEL Classification: K22, K33

I. The meaning of investor and investments under the provisions of the majority of BIT

Each Bilateral Investment Treaty [hereinafter BIT] has in its preamble carefully crafted definitions of what constitute and investment and which entities are entitled to protection as investors. Although the exact wording may vary from country to country, most BIT's definitions share some basic characteristics in respect to investment and investors as detailed below:

"Investment" may mean every asset of an investor that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: 1. an enterprise; 2. shares, stock, and other forms of equity participation in an enterprise; 3. licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law….

Investor of a Party would usually mean a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment …"[3]

II. The protection clauses common to most BITs

A. National treatment clause

Each Party shall accord investments and investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors and to investors of any non-Party"[4]

Article of the BIT sets forth the standard of national treatment in respect to foreign investors. The applicability of this standard is viewed in the context of non-discrimination. Non-discrimination is a well-established standard of protection in international law[5]. In the investment context, discrimination exists where investors or investments in like circumstances are treated in a different manner without legitimate reason[6]. The non-discrimination standard of protection does not

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[3] US-Chile Treaty Concerning the Encouragement and Reciprocal Protection of Investment 7 November 1985 [hereinafter AR BIT or BIT] definition of investor

[4] Idem. Art.4

[5] F.V. Garcia-Amador, *The Changing Law of International Claims*, p. 285 (Oceana Publications, Inc. 1984); Ian Browlie, *System of the Law of Nations* p, 81 (Oxford University Press 1983); Banco Nacional de Cuba v. Sabbatino, p. 845, 867 (2d Cir. 1962); BP Exploration Company (Libya) Limited v. Libya, Award 53 I.L.R. 297, 329 (Oct. 10, 1973).

[6] A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign*

require that all treatment be identical, but that any difference in treatment must be justified on reasonable grounds. As a matter of fact, the only restriction from that perspective is that foreign investors may not be discriminated against on racial or nationality grounds. Such discrimination would constitute a violation of international law and more precisely of international customary law of jus cogens. It is the International Court of Justice (ICJ) who qualified this prohibition as being of jus cogens[7].

In the OECD Draft Multilateral Agreement on Investment , the principle of national treatment in the context of international investment is defined as the obligation of the host country to accord to foreign investors and to their investments *"treatment no less favorable than the treatment it accords in like circumstances to its own investors with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments"*. Of particular interest here is the protection afforded to the establishment phase of an investment. Investment entry procedures can be broadly divided in two categories: notification procedures and approval procedures. The concept of an investment notification system is used as meaning that the foreign direct investor has the obligation to declare the investment transaction to the administrative authority designated by the national law for those purposes. On the other hand, in an approval system, the foreign investor cannot proceed with his projected investment transaction before having obtained administrative approval. The most compelling reasons for refusal to grant administrative approval are those pertaining to national security and safety issues. This view is to be found in both state practice[8] and jurisprudence[9]. Situations where a potential danger of imperilment is to be found are those where. "the foreign interest exercising control ….. might take action that threatens to impair the national security"; public health or public order; national defense or the existence of a serious presumption that the investor will possibly commit specific listed crimes such as drug trafficking, corruption, terrorism or money laundering.[10] . This is especially true if the scope of the investment is the exploitation of natural resources. States have a right of permanent sovereignty over the natural wealth and resource of their territory According to the UN Declaration of Permanent Sovereignty over Natural Resources and the Charter of Economic Rights and Duties of States, which in fact represents opinion juris of the overwhelming majority of states. This right "must be exercised in the interest of their national development and of the wellbeing of the people of the state concerned ". Public concession is a complex issue in itself and multiple bids are often being received in the process. It is therefore for the State to decide which bid is the most profitable for the long-term durable development of the community.

B. Fair and equitable treatment clause

The term fair and equitable treatment covers both the reasonable expectations an investor may have when making an investment as well as the effectiveness of the recourse at its disposal when defending against State infringement on its rights.

1. Reasonable expectations

A State acting within Constitutional limits, in adopting measures executed in good faith and in compliance with relevant laws, can not be said to have affected the basic expectations taken into

Investment: An Overview, 8 J. TRANSNAT'L L. & POL'Y 57, 59 (1998).

[7] The Restatement (Third) Case concerning the Barcelona Traction, Light and Power Company (Second Phase), Judgment of 5 February 1970, ICJ Reports 1970; Beveridge, Fiona, The Treatment and Taxation of Foreign Investment under International Law, Towards International Disciplines, Manchester University Press, Manchester, 2000;

[8] Exon-Florio amendment, Omnibus Trade and Competitiveness Bill of 1988, section 5021 (Pub. L. No. 100-418, 102 Stat. 1107; 50 U.S.C.App. § 2170); CANADA, Foreign Investment Review Act, 1973.; CANADA, Investment Canada Act, 1985.; AUSTRALIA, Foreign Acquisition and Takeovers Act of 1975.; FRANCE, Monetary and Financial Code.; EUROPEAN UNION, Directive 94/22/EC of the European Parliament and the Council of 30 May 2004

[9] Court of Justice of the European Communities, Decision 14 March 2000, Association Église de Scientologie deParis & Scientology International Reserves Trust v. the Prime Minister of the Republic of France, C-54/99. Points 18-26.

[10] See supra 8

account by a foreign investor. may not claim a breach of fair and equitable as the "alien investor must take the local law as he finds it in regard to the regulation of the economy"[11].

2. Denial of justice

In international and national procedural law a claim may not arise out of lack of standing. It is for every State to establish its own procedural rules and for the national courts to apply those rules to pending criminal or civil cases. For a case to be brought before a court it must have standing. Whether or not the claimant has standing to sue, is to be decided by thorough examination by the competent court. If a claim is rejected the court will not need to examine on merits. The duty of a State towards foreign nationals is to provide a system of justice which ensures fairness and compliance with standards of international law in all cases. That system should include appellate and review procedures opened to all parties[12].

"If the courts or other appropriate tribunals of a State refuse to entertain proceedings for the redress of injury suffered by an alien, or if the proceedings are subject to undue delay, or if there are serious inadequacies in the administration of justice, or if there occurs and obvious and malicious act of misapplication of the law by the courts, which is injurious to a foreign State or its nationals, there is a 'denial of justice', for which the State is responsible[13]."

C. The expropriation clause

BITs invariably provide that neither Party may expropriate or nationalize an investment whether directly or indirectly through measures equivalent to expropriation; except for a public purpose and in accordance with due process of law. If nationalization does occur than the investor(s) is owed a prompt, adequate, and effective compensation. Non-discriminatory measures of a Party that are designed to protect legitimate public welfare objectives do not constitute indirect expropriation.

1. Direct expropriation

In an international context, a direct expropriation occurs when the host state takes property owned by a foreign investor located in the host state, when there is deprivation of wealth attributable to the State. No direct expropriation occurred because no "essential component of the property rights" has "been transferred to a different beneficiary, in particular the State."[14] It is well settled under international law that direct expropriation is only found where there has been "open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State."[15]. If however the foreign investors "… are still the rightful owners of the companies and their businesses,"[16] and thus no property was not directly expropriated.

2. Indirect expropriation

There is a broad consensus in both judicial practice and academic writings that an indirect expropriation occurs if the interference of the state is substantial and deprives the investor of all or most benefits of the investment. In S.D. Myers the tribunal distinguished regulation from expropriation primarily on the basis of the degree of interference with property rights: "expropriations tend to involve the deprivation of ownership rights; regulations [are] a lesser

[11] Ian Brownlie, *Principles of Public International Law*, p.502

[12] Loewen Group inc. and Raymond Loewen vs United States of America (ICSID case number ARB(AF/98/3)) expert opinion of Christopher Greenwood, March 26, 2001

[13] Oppenheim's International Law, 1992, p. 543-4

[14] Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/18, September 28, 2008, para. 25-57

[15] Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, August 30, 2001, p.103

[16] Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/18, September 28, 2008, para. 25-57.

interference"[17] This view is further mirrored both in jurisprudence[18] and state practice[19]. The deprivation would also have to be permanent or for a substantial period of time. The duration of the economic depravation of property is a crucial factor in determining whether an indirect expropriation has indeed occurred[20]. In Tecmed v. Mexico the Arbitral Tribunal found that a temporary or reversible interference would not lead to the measure in question being labeled as indirect expropriation[21].

3. Police powers as legitimate means of taking property

In the field of international law police powers is a general term used to express the right of government inherent in a sovereign[22]. The government has the right to prescribe, within the limits of its Constitution, reasonable regulations necessary to protect the lives, health and welfare of the community, the preservation of good order and public morals; the restraint and punishment of crime. Therefore not only has a state the right to enact legislation in area it deems necessary, but it also has the right to enforce such legislation for the purpose of protecting and preserving its sovereignty and ensuring the public welfare of its citizen. This view is reflected in international investment instruments such as the Multilateral Investment Guaranteeing Agency Convention, investment treaty practice and codifications such as the US Third Restatement of the Foreign Relations of the United States[23] and the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens. Moreover, arbitral tribunals also share this view and have held that parties are "not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State"[24]. This abstract principle is deemed "indisputable" under the norms of customary international law.

Host states are compelled to exercise their police powers in full compliance with the provisions of the relevant BIT. If the measures taken are for a public purpose, are non-discriminatory and are accomplished by due process then from the stand point of international law they are deemed a lawful regulation and not an expropriation.

Bibliography

1. *Barcelona Traction Light and Power CO.* (Spain v. Belgium) 1970. ICJ Reports
2. Garcia-Amador, *The Changing Law of International Claims* (Oceana Publications, Inc. 1984)
3. Ian Browlie, *System of the Law of Nations* (Oxford University Press 1983)
4. A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, J. TRANSNAT'L L. & POL'Y 57, 59 (1998)
5. Court of Justice of the European Communities, Decision 14 March 2000, *Association Église de Scientologie deParis & Scientology International Reserves Trust v. the Prime Minister of the Republic of France*, C-54/99, www.curia.eu.
6. International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries, as contained in Report of the International Law Commission Fifty-Eighth Session*, UN GAOR, 61st sess, Supp No 10, UN Doc A/61/10 (2006)

[17] *S.D. Myers, Inc. v. Canada*, (November 13, 2000) Partial Award, para. 232

[18] Tippetts v. TAMS-AFFA Consulting Engineers of Iran, 6 Cl. Trib. 219 (1984); Starret Housing Corp. v. Iran, 4 Iran-United States Cl. Trib. Rep. p. 122, para. 154 (1983); *CME (Netherlands) v. Czech Republic* (Partial Award) (13 September, 2001), p. 166, para. 591

[19] US-Australia Free Trade Agreement signed on March 1, 2004; The US-Chile Free Trade Agreement was signed on June 6, 2003; US-Morocco Free Trade Agreement signed on June 15, 2004

[20] S.D. Myers, Inc. v. Government of Canada, partial Award, 13 November 2000, para. 283

[21] First ECT Arbitral Award 16 December 2003, unpublished; K. Hober, Investment Arbitration in Eastern Europe: Recent Cases on Expropriation, 14 The Amercian Review on International Arbitration 2003, p. 377, 438, 441; Técnicas Medioambientales Tecmed S.A. v. United Mexican States (ICSID Case No. ARB(AF)/00/2) (2003)

[22] Award December 29, 1989, 23 Iran-United States Cl. Trib. Rep. 378; *Tecnicas Medioambientales Tecmed S.A, v. The United Mexican States, ICSID* Award Case No. ARB (AF)/00/2, para. 122

[23] "Restatement of the Law Third, the Foreign Relations of the United States," *American Law Institute, Volume 1, 1987, Section 712, Comment g*.

[24] Too v. Greater Modesto Insurance Associates, Iran-United States Claims Tribunal

7. Ahmadou Sadio Diallo, *Republic of Guinea v Democratic Republic of the Congo, Preliminary Objections*, ICJ at 23 May 2008
8. Stephen Kubiatowski, *'The Case of Elettronica Sicula SpA: Toward Greater Protection of Shareholders' Rights in Foreign Investments' (1991) 29 Columbia Journal of Transnational Law*
9. Interhandel Case 1959 I.C.J. Reports
10. Sicula Elettronica SpA (US v Italy) (Judgment) [1989] ICJ Reports
11. Convention Establishing the Multilateral Investment Guarantee Agency Washington, D.C. October 11, 1985