



MULTIDIMENSIONAL FACETS OF DISPUTE RESOLUTION

By Priya Jha
From Bharati Vidyapeeth University, New law College, Pune

ABSTRACT

Here in this research article the discussion is on constitutional role, corruption in international investment treaties, and review of standard in international investment arbitration. The role playing by domestic and international spheres in state resolutions have discussed. Beginning from the treaty mechanism to the award in which it depends on the constitutional law. Without applying the constitutional law directly tribunals apply it indirectly through interpretations of principle of constitution. This research also exposed false testimony is enveloping at national and international tribunals and identified the causes for the same. Nevertheless, the documentation the scene is quite clear-cut to determine how to minimize it. For that I made some proposals for reducing those, by judge's visit to the scene for perjury prosecution. There were also supporting arguments for the same in a logical manner. Whether to consider it or to address it in the international level is where international law canvases. Here this article depends on the locality of investment arbitration with domestic law and seeks to bring whether exchange of domestic law policies which relates to the political as well

as policy issues. Analysis of these leads to two main conclusions one is macroeconomic policy is reasonable, other is review shall be completely standard. Also it is submitted here is that the goals of investment serves as conclusion which is fit with the polices laws of international vibrant.

INTERNATIONAL INVESTMENT ARBITRATION

As we are seeing in our daily life that the growth rate of global trade as well as investment is rapidly increasing at a high level,¹ Legal firms and their terms are gradually showing their impact to address the issues or resolve the disputes between the foreign nationals. Though there were many ways to resolve the disputes of the cross borders issues between the parties the concept of international arbitration is day by day becoming accepted. Apart from the concept of international arbitration there is another concept called International Investment Arbitration that have collected the huge share of latest headlines. For instance, in a recent past, the tribunal of international arbitration held making Russian federation government liable for \$50.2 billion for the action taken by the Russian Government in taking the assets of Yukos and making it to public use. Actually the claim was mainly based on obligations violated by the Russia under the Energy Charter Treaty by expropriation. This Yukos case is one of the landmark inspiring expansions of the concept of investment arbitration. In the last few years, there were a lot of firms which initiated the disputes with the host states, claiming that the independent bodies of government had violated

¹ U.N.C.T.A.D, Recent Developments In The International Investment Regime,

https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf, Dec 15 2018 11:48 PM.



investment treaties. There were many companies who brought their claims across the world like TCF, Vodafone etc. The amount in these disputes are also overwhelming amounts. Undoubtedly, there were more than hundreds of investment arbitration disputes where every party is claiming over \$1000000000 in damages.² **This procedure is used for solving disputes between host states and foreign investors, which is termed as “Investor-State Dispute Settlement”.** If there is any dispute, the foreign investors have authority to sue a host state and it will have an assurance to have admittance to independent and qualified arbitrators who will resolve disputes and reward an enforceable award.³ So that, it encourages the foreign investors to detour general jurisdictional aspects that might be apparent where it did not have sovereignty, and to solve the disagreement in agreement with the diverse types of protections afford beneath intercontinental treaties and for initiating an ISDS, the respective state must have given consent for the same.⁴

CONSTITUTIONAL ROLE:

The Investor-State tribunals may have authority to hear disputes whose facts are blend closely into the issues of Constitutional law.⁵ In international arbitration the domestic legal provisions are generally cognizable as facts.⁶ The

constitutional law cannot directly throw the obligations which are derived from the International law or international legal instruments because general International law does not permit states to perform such treaty obligations.⁷ The domestic legal provisions are generally cognizable as facts in international arbitration. Constitutional law cannot directly trump obligations derived from international legal instruments. General international law does not permit States internal laws to justify the failure to perform such treaty obligations. These above mentioned points formed two distinct obstacles to the international legal force of domestic law.

In spite of these hurdles, however there are issues stranded in national law may be raised in International Investment Arbitration beyond the circumstances. The relevance of international law does not exclude themselves the additional application of municipal laws; rather, international law may transfer or refer the cases or dispute to these domestic counterparts.⁸

In one of the instances wherein international adjudicative bodies have the long resorted to domestic constitutional legal thresholds which concern the issue of the claimant's or investors nationality.⁹ Yet the above analysis will however naturally involve constitution of the home state of

² Aditya Singh and Vikramadityakhanna, CURRENT TRENDS IN INTERNATIONAL INVESTMENT ARBITRATION, 41 Litig. 41 (2015).

³ Uktu Cosar, Handbook of Investment Arbitration, Thomas H. Webster, 7 Disp. Resol. Int'l 71 (2013)

⁴ Joshua Fellenbaum, Introduction and Remark: Brief of Investment Arbitration, 2 Global Bus. L. Rev. 1

⁵ Lawrence Boisson, What are the Roles played by the Constitution in Investment Arbitration, 15 J. World Investment & Trade 862 (2014).

⁶ *Poland v. Germany*, Merits, 25 May 7926 PCIJ Series A No. 7, 19.

⁷ *Bernardus Henricus Funnekotter v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009.

⁸ Monique Sasson, Substantive Law in international investment treaty Arbitration, The disputed Relation Between domestic law and International Law (Wolters Kluwer 2010) 140-141.

⁹ *Siag v. Egypt*, ICSID Case No. AB/0 5 /15 .Award, 1June 2009.



investors, and then it is the laws of the host State that possess investment tribunals. Even the foundational principles of the constitutions can require a tribunal to measure up to international and domestic norms. There were some well-known arbitral constitutional issues have implied the wide scope of fundamental rights.

Against this background, some well-known arbitration have implied constitutional issues from within the wider scope of fundamental rights,¹⁰ which includes not only human rights but also general public rights as well as basic legal values on which host states depends upon when contracting with the investors. Therefore these principles may range from rule of law and the social justice local community rights regarding resource exploitation.¹¹ Also when fundamental rights are not applicable to a dispute which is not found in treaties or customary law but were found in constitutional law, the constitution plays an important role in filling those gaps in international law. The field of investment arbitration had come up with these issues, particularly with reference to the applicability of the provisions of ICSID Convention. In this scenario, we can see that there are discretionary opportunities for arbitrators to blend together the two legal spheres that are often thought of as distinct. The links between domestic spheres and international spheres can have a vital role in establishing arbitral awards where in EC

Hormones case the Appellate body described in remarkable terms as the real world where people live, work and die. An Ad hoc tribunal in the same year in case of *Himpurna California Energy* echoed that this sentiment in an investment context.¹² Whereas when we come to the applicable norms in a cases involving bribery and serious offences of corruption the tribunal affirmed that it does not live in an ivory tower nor does it view the arbitral process as one which operates in a vacuity, separated it from veracity. Later after a year, under the (NAFTA) i.e. North American Free Trade Agreement the Myers S.D Tribunal had come front with this scrutiny into dispute resolution settlement.¹³ The main thing is it strained its approach as deferential to democratic processes. In a mean while, when it's a time for appraisal of least standards of treatment, the tribunal affirmed that it don't have full permission to the governments verdict, by discovery that the normal remedy for mistakes in contemporary administration is only from domestic politics, and also lawful processes.¹⁴

CORRUPTION IN INVESTMENT ARBITRATION:

The false testimony plays an important role in most of the international criminal tribunals; however documenting the occurrence of false testimony is somehow bringing a way to reduce it.¹⁵ There were many ways to reduce it like sending judges

¹⁰*CMS GT v. Argentina*, ICSID Case No. ARB/01/08, Award, 12 May 2005, para. 114.

¹¹Brian McGarry, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808253, Dec 15 2018, 11:58 PM.

¹² Ernst-Ulrich Petersmann, International Rule of Law and Constitutional Justice in International

Investment Law and Arbitration, Volume 16 | Issue 2, Article 6.

¹³*S.D. Myers v. Canada, liberal award on Liability*, 13 November 2000 (2005) 8 *ICSID Reports* 18.

¹⁴Laurence Boisson, *JOURNAL OF trade and WORLD INVESTMENT*, vol. 15(5-6) (2014), pp. 862-888.

¹⁵ Stanimir A. Alexandrov, Corruption in Investment Arbitration, 109 Am. J. Int'l L. 702 (2015)



on visit to increase perjury prosecutions, for liability which minimizes the need for eyewitness testimony.¹⁶ There is a critical question as to whether address the false cases of which its nature is of false testimony in international criminal law or addresses the cases of false testimony in which public international law tribunal canvasses. For knowing answers we need to categorically look towards the kinds of which the evidence is involved, influence and power of the international court, nature of crime, nature of offender, and his role,. In these years corruption eradication is the main focus of legal practice. The changes of international anticorruption drastically resulted in developing both national measures and international norms. World Bank (WB), and the Organisation for Economic Co-operation and development (OECD) are playing important role in developing the techniques and norms for fighting corruption. Corruption not only in domestic arbitration but also in international arbitration where the resolution brought by the foreign investors in opposition to the other states where the state violate a rapid growth of corruption on the part of investors as defense and prayed for dismissal of the investors claims depends on the unlawful conduct of the investors. Undoubtedly corruption remains as serious issues, and the tribunals given a high priority in order to tackle with it.¹⁷ The most important issues herein raised is how these tribunals will execute the policies showing in number of national and global norms encountering with the allegations of corruption and against corruption.

There were no specific provisions in the recent investment treaties which deal with the corruption, but some treaties had a provision stating that the investment is made in according to the laws of their host states. However in domestic law some provisions seem to be violated to strain out the claims on which investment is made through corruption and it's a ground to dismiss it.¹⁸

There is a doctrine called as "Un clean hands". This doctrine is used for dismissing the cases involved in corruption where there were no provisions in the treaties made by the states. Judge "Gunnar Lagergren's" observation in ICCA 1963, "that corruption is converse to moral principles" and it is an international evil; prevailing common in the community of nations". The corrupt investments and investors will not give protection under these investment treaties and they shall not be protected. while giving a broader protection to those investors not only violate the domestic as well as international public policy where the soul object of these treaties is to promoting capital flows, economic development, creating a level of playing field to encourage investment. But this view is scarcely controversial. These tribunals are not criminal courts, because mechanism followed by the law enforcement authority and the departments is different in order to prove corruption by doing investigation. These tribunals used their powers to order to submit the documents and evidences, but this option is available when the authority ends.

¹⁶ WDF v Kenya, [http://www.italaw.com/documents/WDF v.KenyaAward.pdf](http://www.italaw.com/documents/WDF_v_KenyaAward.pdf), Dec 10 2018, 10:10 AM.

¹⁷ "United Nation Convention against Corruption", GA Res.58/4 Dec 12 2018 11:45 AM.

¹⁸ Stark, Barbara, *International laws & Its Discontents: Confronting Crises*. Press, 2015. Pp. xi, 293. Index.



Hence the tribunal relies on the documents produced by parties, together with evidence of witnesses presented by parties at their hearings.¹⁹ These investors tribunals of course depends upon the findings of enforcement authorities of law but such dependence raises many questions as to whether it depends on those authorities because in many of the cases these authorities harassed the investors. Undoubtedly, these tribunals have conducted the criminal investigation as it is unfair on the part of tribunals to punish them for initiating disputes against state.²⁰ Thus, the findings made by the judicial authorities would require a tribunal to take an approach in appreciating evidence. Further, what if no investigation had taken place for proving corruption? Then the tribunal should take merits on its own facts.²¹

But this is not an end. As the investigation doesn't takes there is a legitimate question arises as to why government has not taken steps to initiate investigation of cases involving corruption in the proceedings of arbitration. Though the domestic proceeding doesn't take place the tribunal can on its own merits came to the own conclusions.

There were additional questions as to whom the burden lays to prove a case and what the evidentiary value of the case is? The burden is on the person for proving on its

claim, but this view is not contrary to common principles its applicability to prove is more complicated and value of evidence tells how much evidence is necessary to prove that claim.²² It is complicated in proving because of very less evidentiary value at the disposal of State-investor tribunals. Also there are some cases in which corruption is manifest like videotape of a meeting or admission by witness. Probably in most of the cases it is difficult to prove corruption as there were no direct evidences to obtain.

In those circumstances, investor-state tribunals recommended that representing the subsistence of "red flags" corruption is also enough to shift burden but some critics were there for this approach to arguing that shifting the burden is incoherent with the right of fair trial.²³ The majority of the investor-state tribunals practically had seen the indicia to resolve the issue of burden can shifted from one person to another person or can shift the same burden from accusing person or party to accused if yes in which cases. The tribunals now came to the consideration that amongst such red flags the payments made to the other parties or to other individuals in the investment activities.²⁴

The following circumstances will take into account such as did it mingled with administrative proceedings and expenditure without proper evidence of contemplation and timing of such payments etc. Once

¹⁹ Stark, Barbara , supra note 18.

²⁰ Stanimir A. Alexandrov, Corruption in International Investment Arbitration, 109 Am. J. Int'l L. 702 (2015)

²¹ Ohlin, Jens David. *The Assault on International Law*. Oxford, UK: Oxford University Press, 2015. Pp. xi, 289. Idx

²² Daspremont, *Founding Doctrines and Techniques*, UK: Edward Elgar Publishing, 2015. Pp. ix, 263. Index.

²³ Convention on Fighting corruption of Foreign Public official in International trade communication , S. TREATY DOC. No. 105-43, 37 ILM 1(1998).

²⁴ Supra note 17



tribunal finds, it as distrustful then shifts the burden from one party to another for the questions regarding those payments. This view was quite looking reasonable it never leave questioning as to the shifting burden of accused must meet in order to prove.

STANDARD REVIEW:

Here this part will explain the “**Standard of Review**” within **Investment Arbitration**. The International Arbitral Tribunal can determine the fact and or law which is produced or made by the Host state is understood in these general terms called Standard of review²⁵. For having a clarity, it is very important to differentiate the review standard from scrupulous methods of review, or the types of lawful tests which is used to make an equilibrium interests like , Balancing test and the grounds which made by adjudicatory review recognized by the investment treaties which are Equitable treatment and fair²⁶. From the above related questions influenced that what will come under the scope of adjudicatory review, ultimately it shows its impact on integrity of adjudicatory review these all include within the boundaries of standard of review. Further in the boundaries of international and domestic adjudication the review standards applied by the arbitrators can have different perspective on a different large species of information which is primarily produced by the primary makers at one hand and (DE NOVO) of the similar measures and its justification at other hand, there is also a

concept called as Deference, it explains about the limitations provided in the level of tribunal for analyzing the related decisions made or determine by the state because the adjudicator shall respect the decision made for the reasons even it is of different appraisal.²⁷

The review made by the arbitrators of investment shall have an effect on the part of verdict and power of adjudicators other types of elected politicians, and the powers among domestic and international²⁸. The standard of review is a terrible concept in the international investment arbitration as this is specifically distributing the adjudication authority from local politics and control. Whereas this process gives direct authority to the investors to have an admittance in international arbitration usually without obligation to fatigue the local remedies, and governance by the state tribunals of investors in checking the conduct of government when compared to other international tribunals²⁹.

There is also other reason as to why the standard of review is a hectic one in the international level is that the binding factors contained in the treaties made by the host states which have been conventionally formulate in ordinary terms which is interpreted in a wider concept with regards to the host-state. Another frequent analysis in the existing literature is that the arbitrators regularly engaged in wrongful standards of review, in which it leads to facilitate state in a proper margin to determine and act various

²⁵ “INVESTMENT ARBITRATION AND PUBLIC LAW” (Gus Van Harten ed., 2007).

²⁶ CHARLES DEBBASCH & FREDERIC COLIN, DROIT ADMINISTRATIF 127 (11th ed. 2002).

²⁷ Stephen and Benedict, <http://iilj.org/wpcontent/uploads/2016/08/Kingsbury->

[Schill-Public-Law-Concepts-to-Balance-Investors Dec 10 2018 08:10 A.M](#)

²⁸ See Kingsbury & Schill, *supra* note 32.

²⁹ Jose E. Alvarez, “*Is the Investment Regime a form of Global Governance*”?, 15 ICCA Congress Series 159 (Albert Jan Van den Berg ed., 2011).



goals of policy, this leads to the authority in which they find by itself, which have failed to allow States a sufficient margin to determine and implement various policy goals, and this has contributed to the legitimacy crisis in which the investment treaty system currently finds itself³⁰. Consequently, there were many suggestions made by the reviewers that using of different types of standards in the investment arbitration is also a way to minimize all those concerns in domestic and international systems. Undeniably, if we go further than the investment arbitration, some authors conditions as to when standard of review utilizes in sensitive cases which are democratically more important to decide certain issues. This is the appliance of principle called subsidiary. Also if that principle is followed it will weaken arbitration as self-governing bodies for adjudicating host state conduct which is the main key role of host-state³¹.

CONCLUSION

We are seeing in our daily life that the hurdle is application of domestic law in international disputes for resolution and the investment arbitration has an enabling provisions or precedents for the same as it is not surprising the other tribunal from their decree towards their judicial processes. The other paths find the way between constitution and investment arbitration. From the above area of discussion this paper suggests that the above mentioned question in scrutiny level which is undertaken by the tribunal is done

only by transposition of local public laws and political laws. Analysis of these leads to two main conclusions one is macroeconomic policy is reasonable, other is review shall be completely standard. Also it is submitted here is that the goals of investment serves as conclusion which is fit with policy laws of international vibrant.

³⁰ “See Guido Santiago Tawil, *On the Internationalization of Administrative Contracts, Arbitration and the Calvo Doctrine*, 15 ICCA Congress Series 325 (Albert Jan Van den Berg ed., 2011) (on the internationalization of administrative

law through consensus building mechanisms such as best practices and regulations)”.
³¹ See Kingsbury & Schill, *supra* note 32