The legal protection of foreign investment under international law

Rabi H khamis •

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المستخلص

تتحدث هذه الورقة بدايةً عن البنود الهامة التي يجب تضمينها في العقد بين المستثمر الأجنبي والدولة المضيفة، إلى جانب القوانين التي تحكم العلاقة بين الطرفين. كما يسلط البحث الضوء على المخاطر المرتبطة بالاستثمار الأجنبي، بما في ذلك المخاطر النقدية والاقتصادية والسياسية والتجارية، وكيفية حماية الحقوق القانونية للمستثمرين الأجانب.

ويؤكد هذا العمل أن بند اختيار القانون هو مسألة مهمة في التفاوض على العقد، ويشرح كيفية تحكم القانون الوطني والقانون المطبق والقانون الدولي العلاقة التعاقدية بين الطرفين.

وعلاوة على ذلك، يتناول البحث بند إعادة التفاوض كترتيب مفيد في العقود الاستثمارية الدولية، الذي يسمح لجميع الأطراف بإعادة التفاوض على شروط الاتفاق عند حدوث بعض الأحداث. ويشرح أيضًا أهمية الحذر عند تضمين هذا البند، حيث يمكن أن يؤثر على استقرار وتنبؤ العقد.

وأخيرًا، يذكر المقال استخدام بنود التحكيم كوسيلة لحل النزاعات بين الأطراف التعاقدية، وكيف أصبح التحكيم الدولي الطريقة الأكثر شيوعًا لحل النزاعات بين الأطراف التعاقدية، خاصة في قطاعات الصناعة مثل التأمين والبناء والخدمات والسلع.

ومن خلال هذا البحث يتم القاء الضوء عن البنود الهامة التي تحمي المستثمرين الأجانب في العقود مع الدول المضيفة، بما في ذلك بند الاستقرار وبند إعادة التفاوض وبند التحكيم. توفر هذه البنود الحماية والأمان للمستثمرين في حين تكون عادلة ولا تتعرض للتحيز من جانب الدولة المضيفة. مع الاشارة إلى الرابط بين هذه البنود والقانون الدولي، مع تقديم أمثلة شهيرة لوصف هذا العلاقة وتوضيح الحالات التي يتضمن فيها العقد كل من القانون المحلي والقانون الدولي. وأخيراً فأن هذا البحث يوصي بضرورة تضمين بنود تسمح للمحاكم الدولية بتطبيق قواعد القانون الدولي أو المبادئ العامة للقانون عندما لا تقدم الدولة المضيفة تفسيرًا رسميًا لقرارها. وبشكل عام، يجب على المستثمرين الأجانب التأكد من أن عقودهم مع الدول المضيفة تحتوي على الحماية والردع الكافيين ضد أي خرق للاتفاق لضمان حماية استثماراتهم في المدى الطويل.

الكلمات المفتاحية الحماية القانونية، الاستثمارات الاجنبية، القانون الدولي

• مستشار قانوني تخصص القانون التجاري الدولي. **Email:** Khamies4@yahoo.com

ABSTRACT:

This assignment discusses the important clauses that should be included in the contract between a foreign investor and a host state, along with the laws governing the relationship between both parties. The article also highlights the risks associated with foreign investment, including currency, economic, political, and business risks, and how to protect the legal rights of foreign investors .

The article emphasizes that the choice of law clause is a significant issue of negotiation in a contract, and explains how the national law, applicable law, and international law govern the contractual relationship between both parties .

Furthermore, the article discusses the renegotiation clause as a useful provision in international investment contracts, allowing all parties to renegotiate the terms of their agreement upon the occurrence of certain events. It also explains the importance of caution when including this clause, as it may impact the stability and predictability of the contract.

Finally, the article mentions the use of arbitration clauses as a means of resolving disputes between contractual parties, and how international arbitration has become the most common approach to resolving disputes between contractual parties, especially in the industry sector such as insurance, construction, services, and goods.

The assignment discusses the important clauses that protect foreign investors in contracts with host states, including the stabilization clause, renegotiation clause, and arbitration clause. These clauses provide protection and security for investors while being equitable and not prejudicing the rights of the host state. The author highlights the link between these clauses and international law, providing famous examples to describe this relationship and illustrating situations where the contract contains both domestic and international law. The assignment recommends including provisions that allow international tribunals to apply the rules of international law or general principles of law when a host state does not provide an official explanation for its decision. Overall, foreign investors must ensure that their contracts with host states contain adequate protection and deterrence against any breach of agreement to ensure that their investments are secure and protected in the long run

Key words: Legal protection, foreign investments, international law

Introduction.

Before discussing the clauses that the contract between an investor and a sovereign host state must include, it is important to understand the meaning of foreign investment and the laws governing the relationship between both parties. According to Sornarajah, "Foreign investment involves the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owners assets".(Sornarajah, 2010,P 55-59)

As a result of market demand and government incentives over the past two decades, there has been a fundamental increase in international investment in states that have natural resources such as gas, gold, and oil.(Nick M, & Richard M,1999, P20- 22)

Despite the widespread acceptance of the benefits of international investment, many investors remain hesitant due to various risks associated with foreign investment, including currency, economic, political, and business risks. These risks may result in unexpected losses for the investor, primarily due to changing regulations or contract terms by the host state. (Brian Perry, Evaluating Country Risk for International Investing)

To protect their legal rights, foreign investors often include specific clauses in their agreements with host states. Three different legal frameworks govern these clauses, including:

National laws, contractual legal frameworks, and international laws between both parties. The international laws provide the highest level of protection for foreign investors through reference to the application of international law to govern the contractual relationship.(Salacuse, J.W., 2013. p35 -47)

Important clauses that must be included in the investor-state contract include the choice of:

law clause, renegotiation clause, stabilization clause, and umbrella clause. These clauses are essential, especially in petroleum agreements, where investors must be careful of their investment due to the risks involved. The level of stabilization in the host country is vital to the investor because the less steady state that he notices will lead to less favrable conditions needed to enter into a long contract. The relationship between these clauses and international law, including modern bilateral investment treaties (BITs) and general principles of law, also provides standard protection for foreign investment.

Arbitration clauses.

It should be noted that with the increase in globalization and investment, it is natural that disputes will arise between businesses, countries, and investors. (Margaret L Moses, 2012, p103)

To prepare for these contingencies, parties often choose to include an arbitration clause in their contract. To this end, some practitioners define international arbitration as follows (Katia Yannaca, 2010, P.116-117)

"International arbitration is the leading form of international dispute resolution between businesses of different nationalities foreign investors and states. It is a consensual, neutral, binding, private, and enforceable means of international dispute resolution that is typically faster and less expensive than domestic court proceedings. It blends elements of civil law and common law procedure, while allowing the parties to design the procedural rules under which their dispute will be resolved." (International Arbitration, available at https://international-arbitration-attorney.com/)

Arbitration has been used as an approach to deal with various types of allegations or claims between disputing parties for many years, with Lords in England and sheikhs in the Arab states, making appropriate decisions for such claims. However, in recent years, especially in the industry sector such as insurance, construction, services, and goods, international arbitration has become the most common approach to resolving disputes between contractual parties.The international community has also adopted international arbitration to tackle complex commercial transnational disputes.

Choice of law clauses.

The choice of law clause is often a significant issue of negotiation in a contract because each party wants to apply their preferred law, either the national law or the applicable law (favorable law). Article 42(1) of ICSID addresses this issue. When the contract misses this term, the national law is potentially held to be the governing law, but the foreign investor may insist upon some of the favorable clauses to govern the contract under international law. (Crawford, J. and Reisman, W.M., 2005. Pp.223-227)

This issue often appears in contracts with states, and investors to avoid changing the terms given in the host state law. Using national law may give the state a position of power in front of the investor, and it could be more favorable to the host state if changed in a way that benefits the state. Therefore, the investor always looks for the applicable law that serves his interests. However, the investor may agree to the national law as the applicable law in one case, and that is when the national law enters into force from the date of the contract.

Foreign investors always cover themselves by applying different sources of international law, especially Bilateral Investment Treaties (BITs), which is the most important source that protects foreign investors. Choosing the applicable law, such as a neutral law, is more beneficial for the foreign investor, with the exception of insurance, which is always guaranteed in the stabilization clause.

The principle of equality between states means that a host state cannot object to being subject to the laws of another sovereign state, including the applicable law chosen in a contract. However, a host state may not want to be subject to the laws of a third-party state as these laws can be changed at any time, and which may negatively impact the host state's position in the contract . (Crawford, J. and Reisman, W.M., 2005. Pp.223-227)

Choosing international law as the governing law for an international contract is also not ideal because it is not perfect or sufficient to be applied by courts. However, Professor Bowett disagrees and argues that the main problem is not with the capacity of international law to develop these rules, but with states' inability to identify these rules. (Derek William Bowett, state contracts with Aliens, 1988.p.p.49.54)

Renegotiation clauses.

The renegotiation clause is a useful provision in international investment contracts, allowing all parties to renegotiate the terms of their agreement upon the occurrence of certain events. It is particularly helpful in long-term contracts where the political, social, and financial climate can change dramatically over time, potentially affecting the economic outcomes that the parties originally envisioned. (John Y. Gotanda, 2003)

The clause provides protection for the foreign investor against any changes in the commercial balance of the contract due to force majeure or hardship clauses, while also upholding the principle of pacta sunt servanda. (Berger, K.P., 2003. p.1347.)

Moreover, given the seriousness of this term, it must be treated with caution because it can impact the stability and predictability of the contract, which are crucial factors in creating a suitable investment environment. Furthermore, the cost of the contract can be affected as a consequence of the uncertainty surrounding the economic returns, which may result in the investor's hesitation to enter into the agreement. (Gotanda, J.Y., 2003, p.1461.)

Additionally, in cases where the parties cannot reach an agreement during renegotiation, it is unclear whether a dispute still exists or if there is no longer a conflict between the parties. This may prevent the tribunal from exercising its jurisdiction and issuing an award. The Sheikdom of Qatar provides an example of how the renegotiation clause has been used in their contracts. While it can be a useful tool, its limitations must also be considered to ensure a fair and stable investment environment for all parties involved. (Model Exploration and Production Sharing Agreement, 1998.pp. 411, 416)

Stabilization clauses.

The third important clause that provides considerable protection to the investor is the stabilization clause. This condition prohibits another party from changing the laws that govern the relationship between the foreign investor with a host state. (Bishop, R.D., Crawford, J. and Reisman, W.M., 2005.p77)

According to a study in 2008, the stabilization clause is defined as "contractual terms" in a private agreement between investors and a state to address the issue of changes in the law in the host state during the life of the project. Furthermore, there are three types of this clause that form a stabilization clause: the freezing clause, the equilibrium clause, and the hybrid clause. (Shemberg, Andrea, *Stabilization Clauses and Human Rights*, 2008, p 4)

Each term is related to a specific issue. For instance, the freezing clause releases foreign investment from any obligation of new laws that may have an effect on the investment of the investor. The equilibrium condition refers to the financial loss that has come from changing these laws, and the last type, the hybrid clause, is a mixture of both clauses mentioned above. (Shemberg, Andrea, *Stabilization Clauses and Human Rights*, 2008, p 4)

The stabilization condition provides the investor with more protection. Furthermore, the state must accept that any new laws will not have an impact on the contractual terms agreed upon with the investor. Additionally, the state shall not prejudice the sanctity of the agreement as a result of using a stabilization clause in the contract that has been protected by international law*.

The necessity of stabilization clauses appears clearly in the petroleum contracts (long term), which keep the investor safe from the influences of national law. However, in order to recognize the importance of this clause, we should look at the law that governs the contract as a first step, which often is the international law to apply a national law of the host state. The best example of a stabilization clause was in the concession contract between LIAMCO v LIBYA case.

* Impact Of Stabilization Clause On Petroluem Agreeme http://www.lawteacher.net/free-law-essays/commercial-law/impact-of-stabilization-clause-on-petroluem-agreements-commercial-law-essay.phpnts

In this agreement, both parties agreed that any change of the contractual right needs mutual consent of the parties ,as well as any subsequent legislation that may affect the foreign investor's right.* Therefore, an essential element in this clause is that the government cannot take unilateral action on the investor's right by changing the domestic law without the investor's approval. However, in this case and other cases as well , this clause may be affected by political risk when a poorer country does not respect this clause and behaves or makes decisions inconsistent with the stability of the investor's right For instance, this was the case when Iran terminated the Khemco agreement.** To this end the Libyan government nationalized the Texaco overseas company.***1

Umbrella clauses.

The umbrella clause provides foreign investment protection through BITs and MITs treaties, and this right is independent of the right granted by the contract. However, in some cases, a host state confirms through signing the treaty that it has the responsibility for any obligation towards the foreign investor. Therefore, a foreign investor may argue that a breach of an agreement could elevate via umbrella terms to the allegation under investment treaties in order to gain the treatment and protection optional under this treaty .

In addition, many treaties give the foreign investor the right to arbitrate a dispute with a state, and this particularity is to provide a high level of protection on one side, as well as to encourage the investor for more investment in the future. According to the ICSID tribunal, in this standard, the umbrella clause grants that "each party shall observe any obligation it may enter into with regard to investment." (State – Argentina ,BITs of MNOI -1991)

The Tribunal in CMS Gas Transmission Company v. Republic of Argentina,(CMS v. Republic of Argentina, ICSID case No. ARB/01/8, Award 12 May 2005) states that Argentina is internationally responsible under the umbrella clause as included in the Article II(2)c) of the US-Argentina BIT. This means that the application of this term has restricted the contract between the foreign investor and the sovereign state.*

"*Purely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is*

*See note 10

**See note 12

***Texaco Overseas Petroleum Company and California Asia Oil Company .v. The Government of Libyan Arab Republic 19th January 1977 53 I.L. *R*

*Interpretation of the Umbrella Clause in Investment Agreeme / available online Accessed 10 December 2015. www.google.co.uk/search?tbm=bks&hl=en&q=umbrella+clause+#q=Interpretation+of+the+Umbrella+Clause

significant interference by governments or public agencies with the rights of the investor. "(Award, p. 299)

The relationship between international law and the clauses of international contract.

The relationship between international law and the clauses of international contracts is strong and interconnected. The main sources of international law are treaties, general principles of law, and customary law, as outlined in Article 38(1) of the Statute of the International Court of Justice '[**]

Investment treaties are a significant source of international law because they provide a high level of protection for investors and ensures a suitable legal structure for their operations. (Susan D. Franck، ،2007 p. 337)

These treaties grant investors substantive rights, including appropriate compensation for expropriation and protection against various risks they may face in the host state. The arbitration clause in BITs allows foreign investors to sue the state directly if there is a breach of the treaty, which can correct inappropriate government behavior. (Susan D. Franck، ،2007 p. 337)

The LIAMCO v LIBYAN case illustrates how the clauses of international contracts seek to protect foreign investors from the behavior of the host state. The case involved a breach of contract by the Libyan government, where the government nationalized 51% of the interests and property of LIAMCO. The choice of law term, renegotiation clause, stabilization clause, and arbitration clause were used to protect the investor's rights. (Robert ،B von mehren & P, Nicholas kaurids)

The international tribunal believed that the Libyan government violated the concession agreement, and while they had the right to their property, they were still responsible for their actions[*].

The link between these clauses and international law is significant as they provide a high level of protection and security for foreign investors while being equitable and not prejudicing the rights of the host state. The choice of law term

**Statute of the International Court of Justice (ICJ Statute) (San Francisco, June 26, 1945, 33 UNTS 993, 59 Stat 1055).

*Case summary ,Libyan American Oil Company (LIAMCO) v The Libyan Arab Republic available online at http://www.biicl.org/files/3939_1977_liamco_v_libya.pdf seeks to apply international law or general principles of law instead of national law to protect the investor against unpredictable risks. BITs contain arbitration terms that allow foreign investors to bring a host state before an international tribunal if there is a breach of contract, and the umbrella clause provides significant protection for a foreign investor in case the host state changes the law. These conditions reflect the desired relationship between both sides and encourage foreign investors to invest abroad.

In summary, the clauses of international contracts and international law are interconnected, and their relationship is crucial in providing a suitable legal framework for foreign investors to operate in the host state. These clauses provide protection and security for investors while being equitable and not prejudicing the rights of the host state, leading to a positive relationship between both parties.

Conclusion.

In conclusion, this assignment has highlighted the significant clauses that provide fundamental protection to foreign investors in contracts with host states. The author has analyzed these terms separately, showing their strengths and weaknesses. The objective of these conditions is to protect foreign investors in long-term contracts while restricting the power of the host state from making unilateral decisions to change the governing law without the consent of the foreign investor. [**]

The arbitration, renegotiation, and stabilization clauses have been discussed in detail, showing the positive aspects of these conditions while also highlighting potential drawbacks. The assignment has also highlighted the link between international law and these clauses, providing famous examples to describe this relationship and illustrating situations where the contract contains both domestic and international law.

Finally, the assignment recommends that both parties in international contracts understand their duty by including terms that protect both their rights and put deterrent penalties against a host state for any action violating the terms of the contract. The assignment also emphasizes the importance of including provisions that allow international tribunals to apply the rules of international law or general principles of law when a host state does not provide an official explanation for its decision.

**See note 15

In summary, foreign investors need to ensure that their contracts with host states contain clauses that provide adequate protection and deterrence against any breach of agreement. By understanding the importance of these clauses, foreign investors can ensure that their investments are secure and protected in the long run.

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