The Balance between the Public Interest and Investor Protection

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Abstract

This paper's aim is to provide information relating to the balance between investor protection and the public interest in international investment law and United Kingdom law. From the discussion, five main issues were raised: the notion of public interest, the state's right to regulate, the role of the principles of international investment law and United Kingdom law in balancing investor protection with the state'sright to protect public interests, and the mechanisms of balancing state rights and investor protection.

Without a doubt, states have the right to regulate their social, political and economic affairs. The mandate to govern emanates from many legal justifications, including the sovereignty of a state, the contract theory and a government's obligations to protect its citizens. However, a state's support of binding international investment treaties ensures that its regulations are consistent with its obligation under the treaty; therefore, the right to regulate does not justify the violation of investors' rights. At the center of the right to regulate is the obligation to prevent the breach of legitimate expectations, which form the basis of investment decisions. This brings us to the principles of international investment law, including fair and equitable treatment, a stable and predictable legal framework, due process and proper dispute resolution mechanisms. It is arguable that the international investment principles are crafted with the investor in mind and are not sufficient to address the day-to-day dynamics relating to public interests. An essential aspect of a trade agreement is the creation of a dispute resolution mechanism capable of resolving issues arising from conflicts between foreign investments and public interest. Foreign investors' interests are safeguarded by the right to access neutral and effective dispute resolution mechanisms that are capable of enforcing their rights as provided by relevant treaties. While the same applies to citizens in the host country, the public interest is given more prominence by the state's right to regulate.

Keywords: International Investment Law, Legitimate Expectations, The State Sovereignty, The Contract Theory, Dispute Resolution Mechanisms.

Introduction

The states are responsible for protecting the public interest and investors and have therefore supported bilateral investment treaties, regional trade agreements, and the collective international investment law. International investment law creates a favorable environment for foreign investors based in another country to acquire business assets with the intention of making profits and advancing their course of business. Therefore, international investment law aims to protect investors from unstable political systems, unpredictable foreign economies, and discrimination. It also focuses on reducing the high cost of production and for harmonising legal systems. In most cases, international investment law focuses on three legal entities, viz., the states, regions, and business organisations which are the primary actors in trade relations. The agreements between states for the purposes of foreign investments exclude the people or public in the host countries.

Nonetheless, the states have a responsibility to protect their host countries from the adverse effects of foreign investment which could have significant impacts on the social, economic, political and environmental wellbeing of the people. International investment laws also ensure the protection of the public interest by creating principles that safeguard the environment and human rights and discourage illegal conduct, such as corruption and other internationally accepted illegalities. While foreign investment stimulates economic growth, states must achieve proportionality between investor protection and public interest.

The paper will be presented in five main sections: Section one considers notion of public interest and how the varying and changing nature of public interest affects the protection of investors. Section two seeks to consider the state's rights to regulate. Section three will address principles of International Investment Law, while Section four will discuss the balance between public interest and investor protection in United Kingdom. Section five seeks to ascertain the optimum balance between the public interest and investor protection as well as what the guarantees and protection are in the event of a violation of public interest.

Section One - Notion of Public Interest

Public interest is a major concern towards all the people within a specific locality, city, state, or nation by the government or other responsible organization(1). In the context of International investment law, it is concern towards all the people among the involved nations so the investment does not harm any individual but rather benefits all, or at least some, of them. It further involves the development of consensus in the treaties among varied nations that relate to the rights of the involved common people. In this regard, the common public interest, which is considered in many nations, is the reduction of taxpayers' liability. Public interest in the context of International Investment Law is the maintenance of national security. In addition, public interest involves ensuring that the international investment does not cause harm to the environment so that it does not indirectly affect people in an adverse way(2).

Nature of public interest, along with acts, is not the same throughout the world. It also differs among varied nations and states. Thus, the varying nature of public interest affects international law for the investors' protection. In some of nations or states, the majority of the people may have certain health issues, which may differ with people of other countries. This implies that healthcare needs among the public of different nations may not be the same. This, in turn, results in the difference in the form of investment(3).

Another aspect of public interest which severely hampers international law for the protection of investors relates to land law. In almost all nations, states, and localities, there are at least some aspects in the land laws that attempt to ensure the interest of the landowner, i.e., the public. The protection of the landowner, in certain aspects, is justifiable and morally acceptable. However, the land laws in some of the nations and states are highly discouraging to the investors and against international law. International investors are not able to procure lands, which affects investment. It is unfair to international investors if the land laws are against them and in favour of the local investors(4).

(1) Gerry Stoker, Was local governance such a good idea? A global comparative perspective, Public Administration, vol. 89, no. 1, 2011, pp.15-31.
(2) Alison Giest, Interpreting Public Interest Provisions in International Investment Treaties, Chicago Journal of International Law, 2018, https://cjil.uchicago.edu/publication/interpreting-public-interest-provisions-international-investment-treaties.
(3) Stephan W. Schill and Christian J. Tams and Rainer Hofmann, Oceans and Space: New Frontiers in Investment Protection?: An Introduction, The Journal of World Investment & Trade, vol. 19, no. 6, 2018, pp.765-774.
(4) Howard Mann and Konrad Von Moltke, Protecting Investor Rights and the Public Good: Assessing NAFTA's chapter 11, Conferences on NAFTA, 2002), pp. 1-27.

The local and national governments attempt to enact policies for dissolving monopolies and competitive advantages of some companies in specific industries or sectors. This action is only to ensure public interest so that such companies do not price the goods and services at an unreasonably higher rate, which severely affects the buyers, especially when the goods or services are of extreme necessity.

However, in some instances, this attempt at public interest is against international law and further discourages investors. The protection of the investors is affected when the goods or services are made after extensive effort and investment in the research and development. This situation is particularly notable in the pharmaceutical industry, such as when a particular medication is manufactured after extensive research and development involving major financial investment as well as effort. This indicates that the nature of public interest affects international law, which protects the investors(5).

Different state and the national governments attempt to enact varied laws for environmental protection. These laws are, in fact, to ensure public interest so that environmental protection produces healthy and sustainable living for people, which is crucial considering that the by-products of many manufacturing companies are extremely harmful. These by-products release liquid and solid chemicals directly into water and soil as well as harmful gases.

This pollution, in turn, severely affects the environment, surrounding people, and animals. Factories and plants also cause noise pollution, which severely affects elderly people. Thus, different nations and states implement varying and changing policies for environmental protection so that factories and plants do not release harmful by-products nor cause noise pollution. However, this affects the factories and plants without the minimal level of by-products and sound because it becomes difficult for them to manufacture the desired products.

The public interest policies implemented by the local and national governments, in instances, are stricter compared to international law, which often affects the protection of investors(6).

(5) Ibid.

(6) Benedict Kingsbury and Stephan Schill, Public law concepts to balance investors' rights with state regulatory actions in the public interest—the concept of proportionality, International Investment Law and Comparative Public Law, vol. 75, (2010), pp.75-104.

Section Two - State's Rights to Regulate

A state's legitimacy in regulating its social, economic and political infrastructure and in protecting the public interest is a critical element of international investment law. Pursuant to Texaco Overseas Petroleum Company v. Libyan Arab Republic, states have the right to choose their own social, political and economic system and adopt rules that protect the public interest(7). Be that as it may, a state's right to regulate has come under criticism for undermining the intention of international investment law, which is to create minimal legal hindrances for smooth business operations.

The underlying question is whether the principles of international investment law are sufficient to protect the competing rights, those of the investors and the public. The right of states to regulate is twofold. First, through international trade agreements, the states have the obligation and right to promote domestic development priorities and create a conducive environment for foreign investors. Secondly, a country bears the responsibility of protecting the public welfare from the possible adverse effects of foreign and domestic investment practices, such as pollution, health factors, and exploitation. Host states are entitled to review and maintain a reasonable degree of regulatory flexibility to respond to the contemporary circumstance in trade and the public interest(8).

Generally speaking, the right to regulate is drawn from the moral and political philosophy theory of social contract. Notable proponents of the social theory as the doctrine of political legitimacy include Thomas Hobbes, Immanuel Kant, Jean-Jacques Rousseau, and John Locke. The social contract theory is premised on the fact that people consent to surrender their rights and some of their freedoms and subject themselves to the government (or authority) in exchange for protection of their rights(9).

Therefore, where the state has the legitimacy of power over an individual or a community; it bears the burden of ensuring that individual interests are safeguarded from third parties. The context of the right to regulate while protecting the public interest in international investment was captured in Tecmed v Mexico, where the arbitration tribunal indicated that a state's right to regulate (police powers) is premised on the sovereign powers of the said nation(10).

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(7) Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, 1 177 I.L.M. (ICSD 1978).

(8) Electrabel S.A. v. Republic of Hungary, ARB/07/19, (ICSID 2014).

(9) Ryan Muldoon, Social Contract Theory for a Diverse World: Beyond Tolerance, 1st ed., repr., New York, NY: Routledge, Taylor & Francis, 2016, 1-20, p.5.

(10) Tecnicas Medioambientales Tecmed S.A. v. United Mexican States ARB(AF)/00/2 (ICSID 2003).

Therefore, any consequence to a foreign investor, including damages or contractual deprivation based on a country's exercise of the right to regulate, precludes a state from compensating an injured party[11].

However, in the context of international investment, the right to regulate is exercised with regard to the principle of fair and equitable treatment of investors. The arbitration tribunal in Eron v. Argentine upheld the concept of "fair and equitable treatment" by indicating that it creates a stable, certain and predictable environment for foreign investors[12].

The certainty of legal and administrative measures within a country is an essential factor in making foreign investment decisions, and countries with an elaborate and friendly system attract more foreign investment opportunities. Foreign investment companies are entitled to compensation when the host country makes changes to the legal framework governing the investment which was not contemplated or foreseen at the time of investing[13].

Section Three - Principles of International Investment Law

The principles of international investment law play an important role in achieving a balance between protecting the investors and safeguarding public interests. An important consideration within the scope of international investment laws is that, as with other international law instruments, they are founded on critical principles: the sovereignty of states, the binding nature of treaties and other things. In most cases, the emphasis is placed on the sovereignty of nations as a means to discern which countries can negotiate with others and determine their social, political and economic futures.

International investment laws aim to achieve the balance between investor's rights by creating a stable, consistent and predictable legal regime (trade agreements). This can be achieved by giving the state parties autonomy to negotiate favorable trade agreements that are adequate to their economic stability.

Therefore, first is the recognition that states are sovereign and have the power to enter into international agreements with others for the purposes of social, economic and political prosperity. It is arguable that the Charter of Economic

(11) Saluka Investments BV v Czech Republic, Partial Award, ICGJ 368 (PCA 2006).

(12) Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic. ARB/01/3 (ICSID 2003).

(13) Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, No. ARB/03/19 (ICSID 2017).

Rights and Duties of States give prominence to the state police powers to safeguard national interests first(14).

The creation of trade agreements against the backdrop of the two competing rights (investors and public interest) is an indication that investment law gives credence to sovereignty. For example, the Charter of Economic Rights and Duties of States grant the state powers to regulate and exercise authority over foreign investments within their national jurisdiction in compliance with national objectives and priorities(15). After establishing sovereignty, one has to examine the intentions of creating international trade laws, which are to create stability, predictability, and consistency.

Another critical consideration while framing international investment law is the protection of investors and their investments while maintaining legitimate expectations. This principle is anchored on the basic understanding that business enterprises they seek to operate in an environment that allows business growth, profit-making, minimal interference and, more importantly, appropriate security measures.

Where parties agree, it would be absurd to expect that the contracts were made without due regard to the existing legal, economic and political status. Without a proper business environment, there would be no foreign investors, and trade agreements would be futile. It is, therefore, a core undertaking among states that investment laws are made to guarantee business certainty. A state regime that perpetuates discrimination, arbitrary deprival of property rights or business practices that are unfair to investors do not align with the spirit of international investment law.

Furthermore, investors who are subjected to such illegality have a right of compensation by the host country. Legitimate expectations are premised on good faith and each country's commitment towards mutual assistance in achieving economic ends. The 1965 International Convention on the Settlement of Investment Disputes (ICSID) and Trade-Related Investment Measures Agreement of the World Trade Organization are some of the core investment laws that have created predictability and stability for international investments.

The principles of international law aim to achieve a balance between the public interest and investor protection by ensuring that disputes are determined by

(14) Charter of Economic Rights and Duties of States, UN GA Res 3281 (XXIX) (12 December 1974).
(15) Charter of Economic Rights and Duties of States, UN GA Res 3281 (XXIX) (12 December 1974).

impartial, predetermined and independent dispute resolution mechanisms. This can be reflected by the fact that the majority of international trade agreements unilaterally agree on the avenue of dispute resolution (in most cases, arbitration), applicable laws and jurisdictions, should a dispute arise on trade undertakings. The International Centre for Settlement of Investment Disputes was created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States for the settlement of disputes between governments and foreign private investors(16).

A government is a party to the ICSID disputes based on its constitutional mandate to protect public interests. However, it is essential to distinguish between public interest and individual interests. The arbitration tribunal has an obligation to safeguard the rights of parties to the arbitration and, therefore, focuses on individual interests. In this context, public interests are those interests that go beyond those of the investors that benefit a large group of individuals in the community.

However, the inclusion of alternative dispute resolution approaches in trade agreements does not conflict with the country's judicial system or the application of local remedies for breaches made by either the international organisation or its agents. In most cases, the arbitration tribunal will apply in disputes arising from contractual conduct or actions that are incidental to the performance of the agreement.

The international arbitration mechanisms do not include agents who can arrest and prosecute foreign investors who are personally liable for criminal conduct. In such circumstances, local authorities may intervene to arrest the individuals cited, try them before a court of law or seek their extradition to their respective countries. For example, the Criminal Finance Act (2017) may change the jurisdiction of an alternative dispute resolution mechanism in the case of possible national security-related threats(17).

Public interests, in the context of the principles of international investment law, refer to the protection of higher values that are safeguarded for the good of society. International investment law focuses on three main categories to protect the public interest: the environment, human rights and the discouragement of certain illegalities (e.g. corruption).

(16) International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations And Rules, ebook (repr., Washington, D.C.: International Centre for Settlement of Investment Disputes, 2006), 5-17, https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf, p.6.

(17) Criminal Finance Act (2017).

In regards to the environment as a measure to safeguard public interests, the international law principle of “polluter pays” is widely accepted as a means of holding industries culpable for environmental degradation which has a direct consequence on human health and survival. The polluter pay principle applies as both an environmental and an international investment principle because most foreign investment undertakings involve the construction of manufacturing and industrial plants in the host country.

According to Beder, the polluter pays principle was created to prevent pollution and, more importantly, to establish some level of responsibility among the competing entities in international trade(18). The case of Chevron v Ecuador highlighted the conflict between foreign investor protection and public interest in regards to environmental protection(19). The plaintiff sought the arbitration tribunal’s decision that the defendants were polluting the environment in Ecuador, thereby undermining international environmental law and public interests.

While the arbitration tribunal was criticised for its determination, it laid two critical perspectives on the issue of public interest vis a vis investor protection. The arbitration tribunal established that besides financial compensation to those affected by the company’s pollution, the government needs to enact policies to protect its citizens from international companies that undermine the environment.

Another important observation was that the host states have the responsibility to ensure that public interests are protected where foreign investors are involved. Further, the tribunal’s ruling coincides with the second environmental principle of preventive action, which requires states and international actors (companies) to put up measures that prevent pollution which has some adverse human consequences.(20) Another critical environmental principle that touches on foreign investment is the precautionary principle that requires that steps should be taken to prevent harm to human health or the environment.

Furthermore, with the rise of foreign investment activities, issues of human protection have gained prominence around the world. In recent times, some multinational companies have been found culpable of perpetrating human

(18) Sharon Beder, Environmental Principles and Policies: An Interdisciplinary Introduction, 1st ed., repr., Abingdon, OX: Routledge, 2006, 32-47, p.32.
(19) Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, 23 UNCITRAL, (PCA 2009).
(20) Beder, Environmental Principles and Policies, 2006, p.3

rights violations, such as those related to child labour, slavery, workers' rights and the right to a healthy working environment. Such undertakings undermine the general international principle of responsible business conduct, which is appropriately anchored on international human rights law[(21)].

The principle of responsible business conduct is an essential facet of ensuring the balance between investor protection and the public interest. One may argue that if corporations could prevent mischief, national legislation that seeks to protect people and that would give the companies a good working environment would not be needed. However, the fact is that most companies cannot regulate their conduct in foreign countries, so the right to govern is fundamental to guide the citizens from possible human rights violations.

While most international investment law commentators perceive the right to regulate as a hindrance to foreign investment, it is essential to underscore the dynamics present in a foreign country. In most cases, countries do not enact legislation to protect themselves from an economic liability. Instead, the states exercise the right to regulate with strict conformity to public interest issues, such as national security, the environment, and human rights. Nevertheless, foreign investors face constant risks from social, economic and political issues, such as inflation, war, political instability, and bad governance.

Section Four: United Kingdom

The United Kingdom has the right to intervene in foreign investment transactions to protect the public interest, including deals that raise concerns regarding national security, health, environment, and financial stability. However, recent experiences indicate that government interventions in foreign investment practices have created some level of non-predictability in the regulatory regime which discourages foreign investments.

The cases of Tecmed v Mexico[(22)] and Glamis v United States[(23)] indicated that states have a responsibility to ensure a transparent and predictable framework for investors' business planning and investment (reasonable expectations). Therefore, the United Kingdom has enacted some legislation, policies, and

(21) OECD, OECD Guidelines for Multinational Enterprises: Responsible Business Conduct Matters, ebook (repr., The Organisation for Economic Co-operation and Development (OECD), 2016), 1-24, https://mneguidelines.oecd.org/mneguidelines_rbcmatters.pdf, p.1.

(22) ARB(AF)/00/2 (ICSID 2003).

(23) International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules, ebook (repr., Washington, D.C.: International Centre for Settlement of Investment Disputes, 2006), 5-17, https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf, p.5.

procedures that aim to protect the public interest and at the same time create some level of predictability for the sake of foreign investors. The United Kingdom's laws cannot be found in a harmonised document, such as the "constitution". They are instead dispersed as acts of Parliament, trade policies, court decisions, and others.

The United Kingdom Enterprise Law is a dominant legislative framework that aims to protect the rights and ensure the duties of investors, consumers, and the general public. The legal regime comprises laws that regulate the environment, consumer protection, human rights, national security, the conduct of investment companies and other matters of public interest. The Human Rights Act (1998) ensures due process, non-discrimination and the protection of property rights for UK citizens in foreign companies(24).

Another essential legal framework established in the interest of protecting public interests is the Industry Act (1975), in which the primary focus is on the operations and ownership of manufacturing companies in the United Kingdom. The law requires the secretary of state to prohibit the control of any "important manufacturing undertaking" transferred to non-UK residents which would be inconsistent with United Kingdom Interests(25).

The UK laws regarding public interest matters, such as environmental pollution and consumer protection, are relatively comprehensive and have been in force for a while. However, with the rise of terrorism, which is a threat to national security, and financial fraud, which undermines Britain's economy, some legislation has been put in place in the last few years. Through the Enterprise Act (2000), the United Kingdom ensures that public interests are considered when authorising mergers and acquisitions.

The law requires one to obtain a public interest clearance by meeting certain thresholds, such as the percentage of ownership (shareholders) and business residence. The Criminal Finances Act (2017) seeks to protect the government and the United Kingdom from the consequences of tax evasion and terrorism(26).

The law has dynamic applicability to UK citizens and foreigners (including companies) operating in the country. The law encompasses measures such as freezing the assets of suspected terrorists or financial criminals.

(24) Human Rights Act. Vol. 42. The National Archives, 1989.
(25) Human Rights Act, §12.
(26) Jonathan S Fisher and Anita Clifford, The Criminal Finances Act 2017, 1st ed. (repr., Abingdon, OX: Informa Law, Routledge, Taylor & Francis, 2017), 1-4, p.1.

As a law that gives more prominence to protecting the public interest, the Criminal Finances Act has some notable features. Previously, the economic laws were primarily concerned with criminalising fraud, money laundering, and other financial offences. Enacted in 2017, the Criminal Finances Act widens the scope of protecting the public interest by focusing on critical contemporary issues, such as preventing human rights violations and recovering money intended for terrorist activities(27). Criminal Finances Act §13(1), (2) provides for the civil recovery of the proceeds of unlawful conduct, which according to §2(b) includes gross human violation. The act extends to activities carried out by private persons whether directly or indirectly.(28)

Further, the United Kingdom has the power to intervene in circumstances where foreign investment undertakings may jeopardise national security. The matter between Atlas Elektronik GmbH and Qinetiq's Underwater Systems Winfrith illustrated the government right to regulate to achieve a balance between investor protection and the public interest (in this case, national security)(29).

AEUK (a subsidiary of Atlas Elektronik GmbH, based in Germany) wanted to acquire Qinetiq's Underwater Systems Winfrith division, which is a significant player in the UK security system. The Underwater Systems Winfrith division is a crucial actor in UK security, as it advises, supplies and supports the UK armed forces(30). This meant that the company's operations could be subject to, influenced by or manipulated by another country, raising critical security concerns.

The secretary of state raised an objection to the acquisition, raising the issue of national security and public interest concerns. The government and the two companies negotiated a deal to include a sufficient number of the company's directors would be security-cleared British citizens. Equally important, the parties agreed that military projects could only be ensured by a company based in the United Kingdom and not any other jurisdiction.

In essence, the ability of the state to enact legislation in the context of protecting the public interest is limited because it also needs to protect investors. The

(27) Fisher and Clifford, The Criminal Finances Act 2017, (2017), p.3.

(28) Criminal Finances Act § 13 (5).

(29) Alastair Mordaunt, «Anticipated Acquisition by Atlas Elektronik UK Ltd of the Underwater Systems Winfrith Division of Qinetiq PLC» (repr., Lomndon, UK: Office of Fair Trading, 2009), https://assets.publishing.service.gov.uk/media/555de36340f0b666a2000084/atlas-elektronik.pdf, p.1.

(30) Mordaunt, «Anticipated Acquisition» (2009), p.2.

existence of international investment law provides that states do not enact laws that are prohibitive or discriminative or that undermine a party's contract autonomy to make a binding agreement.

For example, the aim of making investments is to make profits or returns on investment and not necessarily to help the host country. Therefore, states cannot purport to enact laws that result in the repatriation of profits by foreign companies and that would undermine the essence of business undertakings. To the contrary, states are required under international investment law to provide avenues that allow foreign investment firms to transmit their profits back to their home state.

Equally important, countries are discouraged from interfering with how foreign investment companies conduct their businesses, as it could limit their operations. The fact that most foreign investment companies target developing countries and regimes that have weak domestic legal systems is an indication that international investment law is not sufficient for addressing the public interest.

Section Five - Balancing the Rights: Analysis

Efficient foreign investment protection is an overriding public interest. Although some principles of international investment law aim to protect and promote the public interest, the states reserve the right to create a regulatory regime to prevent harm to their citizens. The case the Amco Asia Co v Republic of Indonesia presented in the International Centre for Settlement of Investment Disputes (ICSID) canvassed the issue of balance between investor protection and the public interest[(31)].

The dispute involved a takeover of a hotel, office, and shop by a foreign investor business partner in the host country (Indonesia) through the help of law enforcement agents. Subsequently, the Indonesian administrative authority revoked the license, which breached some international law obligations according to them. The case raised some fundamental international investment issues, such as aliens' property rights and the state's responsibility to protect the public interest. The arbitration court affirmed that states must strike a balance between public interests and investor protection and by doing so, they protect the interest of development in the developing counties.

Striking a balance between investor protection and public interest can be

(31) Amco Asia Corporation and Others v. Republic of Indonesia, ICSID ARB/81/1 (ARB 1981).

established on a case-by-case basis while applying existing legal jurisprudence. Although international investment law qualifies states' rights to regulate, an express contractual commitment (stabilisation clause) made between two foreign entities can be used as a test to balance the two competing rights[(32)].

The stabilisation clause or specified unilateral declaration is an indication that the state will not make any changes to the legal regime. By doing so, the investors have legitimate expectations that the regulatory framework will remain certain, giving them a predictable business environment. Nonetheless, the foreign investor is required to conduct due diligence on the host country's state of affairs.

According to Toto v Lebanon, in the absence of a stabilisation clause, changes to the host country's regulatory framework amount to a breach of duty to grant full protection and fair and equitable treatment[(33)]. It is important to note that a legitimate expectation does not prevent the host country's sovereignty or its right to modify the legal framework, especially in a crisis.

The indication in Impregilo v Argentine Republic is that investors must be protected from unreasonable modifications to the host country's legal regime[(34)]. A country is likely to be held liable for changing the law unfairly or in an unreasonable or inequitable way to the detriment of foreign investors[(35)].

Justified by the concept of eminent domain, expropriation is one of the state undertakings that widen the discussion between the investor's rights and those of the public. Expropriation refers to the act of a government in taking private property for the purposes deemed to be beneficial to the public interest. Countries have the right to determine the procedures of expropriation where the property in question belongs to its citizens, and such a situation presents minimal complexities, especially in authoritarian regimes. It is, however, a different undertaking where the private property in question is owned by foreigners or a foreign entity, as the rules on international investment law must apply.

The general rule is that the expropriation of property owned by foreign investors is only legal if it is based on public interest, complies with the

(32) AES Summit Generation Limited and AES-Tisza Erőmú Kft. v. Hungary. ICSID ARB/07/22 (APB 2012).
(33) Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID ARB/07/12 (APB 2012).
(34) Salini Impregilo S.p.A. v. Argentine Republic, ICSID ARB/15/39.
(35) Parkerings v. Lithuania. Parkerings–Compagniet AS v. Republic of Lithuania, ICSID APB/05/8 (APB 2208).

due process and is non-discriminatory and subject to compensation. In this regard, unreasonable interference includes the use, enjoyment, and disposal of property through instances of unjustified taxation, refusal to access raw materials, or the provision of import or export licenses. According to LG&E v Argentina, the failure to demonstrate a public purpose or a benefit to the public interest cannot justify expropriation, and the host country will be held liable for the loss to the foreign investor(36).

Further, countries are also invited to establish a balancing exercise between the public interest and the impact on the deprival of property to the investor. This is an effort to discourage discrimination and arbitrariness while encouraging adequate compensation and proportionality. Nations are expected to avoid legal liability and to adhere to the general rule of expropriation, as they play a crucial role in attracting foreign investors.

Two important questions remain. What guarantees are present in the event of a public interest violation? What protections are available against this violation?

There have been various ways to safeguard against a violation to the public interest through investment law. In this regard, it is ensured that the adjudicatory body is impartial and independent so that any arising conflicts or violations to the public interest can be addressed. They need to ensure that the judgment made is neither against public interest nor causes unfairness to the international investors. In addition, the adjudicatory body needs to follow the rules of the International Centre for Settlement of Investment Disputes as well as the United Nations Commission on Internal Trade Law to safeguard the public interest and the international investors(37).

In addition, the adjudicatory body must be coherent in the process of decision making to safeguard international investments and uphold public interest. The process of decision making for similar situations must be the same so that the investors as well as the public have faith in the adjudicatory body.

Moreover, it is necessary to maintain transparency throughout the entire international investment arbitration process in order to mitigate the issue of corruption and the problem of violating public interest effectively. In this context, the adjudicatory body must consider third parties, when involved, in the decision making process. However, it further needs to ensure that there

(36) LG&E International Inc. v. The Argentine Republic, ICSID. Argentina-US BIT (1991).

(37) Alessandra Arcuri and Francesco Montanaro. «Justice for All: Protecting the Public Interest in Investment Treaties.» BCL Rev. vol. 59 (2018), pp. 2791-2824.

is no violation of confidential information, which, in turn, ensures protecting public interests as well as international investors(38).

To safeguard public interest and international investors against investment law violations, there needs to be increased democratic accountability within the respective nation or state. The government of the respective nation or state must actively participate to ensure proper resolution of an issue so that it is fair to the public as well as the investors. In addition, it is important to disapprove the vagueness of treaty standards, which leads towards causing its violation. The treaties among the multiple nations must be regularly assessed for the purpose of ensuring benefits for the investors as well as the public interest((39)).

In case of a violation to the public interest by investment law, along with harming of the investors, remediation needs to be provided that are fair to them. Contextually, the remediation is offered based on the amount of loss witnessed by a party or individual due to the fault of others(40).

In this context, if it is due to investors' conduct, the public's interest is affected and is subjected to pay the remediation to the affected individual. When international investors are affected by an international investment law violation by a local or national government, or any public representatives, they can claim remediation from the latter.

However, the valuation of a specific amount of remediation is complex and difficult to determine. In this regard, there is marked complexity when the amount of loss cannot be calculated, especially in relation to the reputation of investors and the dignity of the public and public institutions(41).

The victim can seek remediation by appealing to a lower court of the respective nation. In case, the remediation obtained is unsatisfactory, the individual can appeal to the higher courts. In regard to injustice to foreign investors, they can seek justice from the international courts and make a claim for a desired remediation there(42).

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(38) Alessandra Arcuri and Francesco Montanaro. P.R., pp. 2791-2824.

(39) Stephan Schill. "International Investment Law and the Rule of Law." Amsterdam Center for International Law (2017), pp. 1-18.

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Conclusion

Based on the overall discussion, it is apparent that a national or state government has the responsibility to ensure the protection of the public's interest. This responsibility is also extending to international investment so that it does not adversely affect any public. The state also has the responsibility to ensure good conduct of business operations. Thus, in some instances, it has been conflicting for governments to ensure that the interests of both the public and the investors are protected.

It is also important to follow international investment laws, which are established through multiple treaties. Changes in the policies of host nations can lead to disadvantages for foreign investment companies, which can ultimately help in claiming compensation. It is notable that the UK government has the right to change its foreign investment policies to protect the interest of its public.

This right is for maintaining financial stability, national security, as well as health and environmental protection. The legislative framework of the UK ensures that investors follow their duties properly. It also attempts to ensure consumer protection against fraud. In addition, the varying and changing nature of public interest affects the international law for the protection of the investors.

The companies need to change their business strategies as well as processes based on the national and state policies, which, in turn severely affect overall business performance.

The principles of international investment law indicate that every nation has the right to enter and exit from an international agreement to ensure protection of consumers. When there is a violation of international investment law, the affected party or individual can claim remediation.

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