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Globalization Management of foreign investment in the light of developments

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Abstract
From the long lost past to date, the outlook by developing and developed countries to the treatment with foreign investors has not been the same and passed numerous ups and downs. A transient outlook to the process of developments governing the international investment brings this to mind that the existing rules in this context have been due to political and economic factors and stimuli in different time periods. For being time two sides contracts of investment which is the most important sources among host countries and foreign investors due to matters of destructive circumferential subsistence & human right is not responsive of the needs & necessities in the field of foreign investment therefore, in this article has been tried to submit some solution for changing of worldwide foreign investment, moving to stable development and obtain the plans for international investment rights.

Key Words: *foreign investment rights, international minimum standard, two sided foreign investment, being worldwide, international circumferential subsistence rights*

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Introduction

nowadays, It can say that developing and least developed countries have an outlook to the foreign investment as a suitable approach to resolve their fundamental economic problems and make their the most efforts to attract increasing foreign investment. The current form of the legal system governing the international investment process has been the product of a wide range of developments. The minimum international standard which was created in the era of colonialism refers to a norm of customary international law that governs the behavior of the government with aliens and the body of principles, which has had minimalist aspect required for the governments to comply with it in treating with foreign nationals and their property regardless of national rules and the current practice in their country. yet the international minimum standard that belonged to foreigners has not considered an legal protection for investors, so that it faced generality, vagueness and uncertainty in terms of content and faced a serious challenge with a standard entitled national behavior throughout the history. Thus governments and foreign investors to establish a suitable legal system for foreign investment resort to other means in the context of international law including mutual treaties of support and encouragement of investment, mentioned as the most common treaties between governments. yet, on one hand nowadays these treaties are recognized as a factor to plunder the country's natural resources because of disregard for resolving human rights and environmental challenges arising from foreign investment; on the other hand, efforts to develop multilateral international conventions in this context did not result in success, led to feeling the need for universal rules in the context of foreign investment once again. Therefore reconciling investment international law and environment international law can substantially step forward in the globalization of foreign investment law. The present research intends to give response to these questions: Throughout the history of the evolution of international investment, whether a binding multilateral treaty was signed in the field of foreign investment? In the absence of such a treaty on the rights of foreign investment, what solutions and suggestions are offered?

For this, this research intends to represent the approaches on globalization of foreign investment and establish uniform rules on the treatment with this type of investment. In this study, we have described and analyzed the foreign investment throughout history via library method. In this regards, the instruments such as note taking from books and English and Persian articles and asking professors' views and references on foreign investment law have been used.

Law on Foreign Investment in the era of colonialism

In the eighteenth and nineteenth centuries which are known as the era of colonialism, supporting trade and investment relations through the use of legal mechanisms was not a major concern for the colonial powers. Because in the context of colonial development, large investments were made and colonial legal systems belonged to the imperialist powers supported the investments that were made in the colonies (frieden, 1994:559-568). Indeed, the powerful governments with resort to non-legal mechanisms, such as diplomatic protection and the threat to military intervention (Vijeh, 2003: 23), supported investor of the citizen of their country. But diplomatic protection as one of the basic principles of international law to secure foreign investment was a serious doubt, because if only the investor complied all the ways to compensate loss regarding the rules in host country, but he failed to get his rights, he could gain support from their respective governments (Amerasinghe,2004). further the national state of the investor had not any duty to support Duty to support their foreigners so that the governments did not support their foreigners when-

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ever they felt ris kat their benefits from political and economic perspectives, but the threat to military intervention or gun-boats policy (Graham-Yooll, 2002: 153) has been other customary practices for the protection of foreign investment (Herring, 2008:153-155). On the one hand, nationalist sentiment within the territory of the host countries (Latin America) using the doctrine (Drago) declared that any military intervention is illegitimate. Luis Drago, Argentine Foreign Minister in writing addressed to the America Government on 29 December 1902 in response to the policy of the Monroe Doctrine, stated that debt of a country in Latin America to some European governments would not be a reason for intervention and invasion of that country by the government(Hershey,1907 :26-45), and on the other hand, Illegitimate use of force to protect the interests of citizens, for example, establishment of Hague Peace Conference in 1907 and the adoption of Drago- Porter Convention, which explicitly prohibits the use of force to obtain loans contracted by Member States caused the intrinsic value of military policy is flawed over the time(sturchler,2007 :11).

Content of the International Minimum Standard

With the outbreak of World War II, the establishment of independent states and the loss of colonial countries' protection from investor of their nationals in the host country, supporting investment in newly independent countries and the responsibility of the host government as a result of losses incurred to aliens have been taken into account (Roth, 1949:160-161). This approach was developed in the nineteenth and twentieth centuries and become a dominant approach that the aliens are supported against illegal measures by host government by means of the rules of international law. The international community came to the conclusion that the standards should be established in the international law that governments are obliged to follow them to foreigners, so that behaviors under these minimums are not accepted in any way. So in this period only legitimate source of concern for the protection of foreign investors has been the rules of customary international law that were reflected in the legal literature as minimum international standards of treatment with foreign investment (Tudor, 2008:61).

Examples of minimum international standard

After the end of colonialism, independent countries want the rule of national law to all persons present in their territory; However capital- exporting countries did not tend to accept the sovereignty of the country on their investors; capital- exporting countries believed that minimum standards should be complied in treatment with foreigners, and if the investee countries allowed foreign nationals to enter into their countries, they must take with them the appropriate behavior, i.e. the concept of minimum international standards emerged as the central concept of international investment law(Dolzer& Schreuer,2008 : 160-162). At this point in time, explaning the meaning and setting the examples for minimum international standards in the absence of a specific convention or an appropriate judicial procedure were given to customs; from point of view of Michael Barton Akehurst, There are six overall concepts that make the violation of minimum international standards, including lack of reasonable care to protect the foreigners by the host government, no explicit penalties for abusers to aliens' rights, encourage private individuals to attack on foreigners, not providing the facilities to receive compensation in the local courts for offenders' acts against alien, gain benefits from acts committed by private individuals like keeping stolen property, Explicit approval of private individuals' acts, i.e. verifying that the individuals have to act on behalf of government(Aghaei, 1998, pp. 110-111).

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Challenges and the inadequacy of minimum international standard

However, international standards for minimum international standard and customary international law with foreigners emerged with ensuring security of ineffective foreign investment; in this regards, formation of a customary international law under minimum international standard for treatment with foreign investment was serious doubt. This is due to the fact that firstly minimum international standard is in challenging with national behavior, so that some countries particularly Latin America countries in accordance to the doctrine believed that the foreign investor is only entitled to the same treatment as the host State makes it with the investor, and the aliens must not enjoy a favorable treatment with the citizens of the host state (shea, 1955:18); Secondly, limits of the minimum standard for treatment with the foreign investor was not specified, so that in 1917 after the Russian Revolution, the concept of national treatment that was offered by Calvo had reached its worst extreme state(Porterfield,2006 :82). Third, the most important challenge is the contrast between powerful capital-exporting countries and the Third World countries dating back to 1962 that led to the issuance of resolution 1803 in General Assembly (General Assembly, 1803: Res 1803). Fourthly, the criterion of minimum international standard does not meet the major purpose and basis, justice (Phalsaphi, 1998, p. 3). Another challenge to this context has lied on this fact that even developed countries had a different procedure in supporting from the minimum international standard. In practice, it has been proven that the developed states in case with the position for capital host state have disagreed with minimum international standard on foreign investors in the strongest way and have supported the national treatment standard.

Law on Foreign Investment in the era of decolonization

After the Second World War, the developing and developed countries concluded that they should allow the foreign investor enters into their country and accept the investment so as to resolve the financial and economic crises. During this period, the regime governing the foreign investment influenced by some factors were subjected to significant changes and a new era named decolonization era began that lasted until the collapse of the Soviet Union. First, Western governments and societies respond to the global recession(Dianne and Arian, 2012, p. 167). The second factor has been decolonization movement by independent states and unwillingness to foreign investment because of their bitter experiences of the colonial era. Investee countries believed that foreign investment is the new pretext by strong countries for intervention within their territory which emerges a new Colonialism (Muchlinsk,2007 :82). The third factor in development of the law governing the foreign investment is emergence of Socialist countries led by the Soviet Union and states' intervention to regulate the market through setting extensive standards to achieve economic development, regarded with regulation-based age in the foreign investment industry(salacuse& Sullivan,2005 :75).

Bilateral treaties

indeed, closed door policy towards foreign investment, investee countries' measures in enacting domestic laws in the area of international investment, control over economic sectors including natural resources and nationalize industries caused harder conditions of entry and exit of foreign capital(lo&tion,2009 :1-3). Developing countries did not want to retreat from their positions on national criteria and restrictive approach in no way. This lack of reliability and security on economic relations and foreign investment threw out the capital- exporting countries to think about transnational rules governing foreign invest-

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ment. On the one hand tools for military threat due to compliance of the Charter of the United Nations with the lack of legitimacy of resorting to military force had lost its place. On the other hand the weakness of customary international law Securing investment had provided a targeted movement in regime governing foreign investment.in this regards, the capitalist countries to neutralize the effect of domestic laws on foreign investment turned to bilateral treaties and made attempt to exclude regulating foreign investment from the realm of national laws and regulations of the investee countries (Mohammadi Dinani, 2008, p. 82).

Multilateral treaties

However the concern by capitalist countries on securing investment in host countries with mutual foreign investment treaties reduced to a certain limit, lack of accountability of bilateral treaties and lack of multilateral treaty in this context have been challenging. it should be noted that the first effort by the global community to set law governing foreign investment at multifaceted dimension dates back to before the second world war in 1929 by the League of Nations on treatment with the foreigners and their property, which remained fruitless due to extensive disagreement by Latin America and eastern Europe countries with the minimum standards on treatment with foreigners. After World War II in 1948, the countries possessing capital to set multilateral contract known with Havana Charter with a approach to formulate multilateral regulation at foreign investment were determined in the field of foreign investment more than ever, but the document was not implemented in practice due to the widening gap between the countries concerned in relation to the content. Despite the failure in 1965 on development in law on foreign investment to resolve disputes, effective steps were taken. At this decade, resolution of the World Bank-Washington Convention on the Settlement of Investment Disputes between States and other Nationals of States was signed(Jalali, 2004, pp. 46-48). yet, as the title of this document indicates, the goal of mentioned convention is to make a mechanism with stability to resolute the differences arising from foreign investment, and other problems including treatment with foreign investor, the conditions to enter and exit the capital are not included in this convention.

Law on Foreign Investment in the Age of Globalization

Rules governing investment in the 1990s after the collapse of the Soviet Union and development of economic relations as well as fading out the national legislation undergo a huge evolution, so that this age was called the age of globalization due to excessive conclusion of bilateral treaties. In this period, the goal to conclude bilateral treaty has not been support from foreign investment in the territory of host states but it has been the intellectual foundation of contracting agreements on facilitation of capital transfer process. Hence, with regard to what mentioned above, it should say that the bilateral treaties at first and age of decolonization caused comfort at battle between opposing forces in the law on foreign investment, considering the fact that before 1990 few treaties were set and signed due to unwillingness of developing countries to acquire foreign investment (schill, 2009 :41).

The universality of bilateral treaties

In the era of globalization or treaties because of changing mental attitudes of developing countries in attracting foreign investment, bilateral treaties on encouraging and supporting the foreign investment was witnessed with unprecedented expansion, so that 2807 bilateral treaties were signed in 2010 between countries. Currently, the best and the most common systematic means to make relationship between host government and foreign investor on bilateral treaties is the support from foreign investors which supports from foreign investors and their property and considers how the

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host government treats with foreign investors in a certain way. Indeed, these treaties imply the reconcile between capital exporting states and capital accepting states. The legal system which has been created from these bilateral treaties on encouraging and supporting the foreign investment conducts how to regulate the relations between states on supporting from foreign investor regarding these treaties.
It is not far from the truth to say that the most important challenge in the field of foreign investment rights is transition from the leading regime of bilateral and regional treaties and reaching to the ultimate aim, i.e. contracting a universal treaty to optimize the foreign investment rights. Yet, the failure of the international community in achieving the ultimate goal and concern about human rights violation and environmental regulations in the process of foreign investment has doubted regulation of foreign investment.

The lack of a binding multilateral treaty

Set up a multilateral agreement on foreign investment in the 1990s by the Organization for Economic Cooperation and Development has been an attempt for globalization of foreign investment law. On the one hand, adopting non-cooperative approach in industrial countries and making negotiations in an intra-organizational way and behind closed doors, led developing countries pursue negotiators' motivation with doubt(Wallace,2003 :150). On the other hand, the provisions of the agreement had not paid attention to resolve the challenges to human rights and environment arising from foreign investment (Morehouse, 1998:13). Yet, in 1996, setting a multilateral agreement on foreign investment under the framework of the world trade organization by establishing a working group for the relationship between trade and investment has been another measure for globalization of foreign investment law. The tasks of this working group are discussing and exchanging views on the necessity of setting up a multilateral agreement on foreign investment. The main differences between this working group and the negotiations by the organization of Economic Cooperation and Development have been the active presence and participatory approach of developing countries in meetings and negotiations. the working group in 2000 in annual report to the general council by the world trade organization stated that there is a severe disagreement between developing and developed countries on setting multilateral rules on foreign investment. Ultimately, with regard to abundant ups and downs to regulate the foreign investment law, the general council of the world trade organization in 2004 stated that the subject of negotiations on setting a multilateral agreement on investment must exclude from the agenda by the world trade organization. Thus, due to a deep gap between benefits of the member countries in the world trade organization, a considerable and huge development for globalization of international investment law was not made. Despite the negotiations by developing states on more than thousands bilateral treaties on investment, in practice they were not ready to accept a multilateral treaty based on the world trade organization. Thus the international community has not reached to conclusion on the adoption of a multilateral international treaty up to date. In fact, the failure of efforts in the OECD and WTO reached us to the conclusion that in a near future it is far from expectation that the customary international law utilizes favorable rules agreed by the states on support from investment.

Globalization of International investor's rights in light of the proposed measures

As mentioned earlier, since 1990 globalization of international investment law was examined via two tests which result from both tests have not been satisfactory. the experience from the first test displayed that the development in the foreign investment law requires a participatory approach to achieve a balance point on the outlooks and interests in conflicting with all the beneficiaries. However this experience

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from participatory approach was compiled in the second test, a suitable result from negotiations was not gained due to the conflict of interests of countries on one hand and lack of suitable infrastructure on the other hand. Now, at new period, it is asked whether the way has been paved to establish a multilateral international convention or customary international law on treatment with foreign investor despite bilateral treaties on foreign investor and establishment of developed countries' outlook on these treaties. it should consider the facts in this context that still old conflicts and severe disagreements on major principles continue at international level; specifically developing countries' unwillingness to such multilateral international treaty and convention in terms of political considerations and fear from adherence to such rules causes failure in formulation of a binding multilateral treaty on foreign investment. Indeed, the investee countries tend for formulation of rules on foreign investment through bilateral treaties. However, despite the general process of changes from control state and setting the international investment towards encouraging the foreign investment, the support and incentive systems differ from an industry to another industry and a country to another country, and any country regarding its economic conditions and programs for economic development found how to treat with foreign investment (Hadadi, 1998, p. 255). In this regards, to optimize the foreign investment law and sign a binding universal treaty for globalization of international investment law, the factors below are suggested:

-acceptance of existing proposed standards in the World Bank policies in investment treaties

Board Development Committee of the World Bank and International Monetary Fund in 1992 to help countries to set rules on foreign investment has released the policies under the World Bank policies on treatment with foreign investment, including National treatment, non-discrimination among foreign investors and fair and equitable treatment. These policies recommend arbitration especially International Center arbitration on investment dispute settlement to the countries and prompt them from expropriation of foreign investments without immediate compensation. yet, the policies which have recommendary aspect were taken into consideration in multilateral treaties including Free Trade Agreement, North America (NAFTA), the Energy Charter Treaty, Protocol IV of the Convention Mercosur and the countries of the Economic Community of Europe. However the most effort has been put in these policies to represent the standards accepted by developed countries, some of the standards on acceptable treatment by developing countries such as national behavior standard are witnessed. Indeed, on one hand these standards are not the final standards, but they are a major step for gradual evolution of acceptable standards, and on the other hand acceptance of proposed recommendations and standards in the World Bank policies in a part of regional multilateral treaties and bilateral investment treaties increase legal significance of these policies. Further, acceptance of the rules set forth in the policies in votes by Court of Arbitration will raise rating to these rules, so that continued such process can hope for emergence of customary international law and a binding universal investment treaty on treatment with international investment.

Suitable infrastructure by detecting existing conflicts

The legal developments on international investment relations require moving forward by countries and interest groups. At current age, with regard to extensive economic relations at international level, cohesive rules can reduce amount of complexity in the field of foreign investment. The fact is that it should reduce the risks on investment by means of diversity of national rules and multiciplicty of bilateral treaties through assimilating the rules on parties' relations in foreign investment. The ma-

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jor goal of setting rule is to resolve the existing conflicts in human communities which must be controlled in a proper way, otherwise setting rule not just help to resolve the conflicts but also misuse of rules increases the conflicts. Conflict of interests in economic relations of countries is a natural order, but it is of great importance that proper recognition of hotbeds of conflict and setting the rules in a purposive way are targeted in resolving the mentioned hotbeds. Thus, recognition of hotbeds of conflict in investment relations of countries with each other is the first step for globalization of international investment law, and providing the required infrastructures to resolve hotbeds of conflict in relations between countries is the next step.

The development of investment law based on attention to interests of human rights and the environment rights

Until each of countries consider their economic interests, agreement on globalization of foreign investment law due to severe conflict of interest between countries will not be possible. Thus it seems that agreement on conflict of interest relies on changing the current attitude, i.e. supporting from foreign investment to an attitude in which the human interests are considered. in other words, sustainable development can raise the constructive interaction between interests of countries(Shahbazi, 2010, pp. 127-129). concept of sustainable development has arisen from the environment international law which is evolving to a concept which includes the tri-lateral relationship between economic development, environment protection and compliance with human rights. Today the foreign investment is an interest to governmental economy but it is not to the citizens and people of the host country. in other words, the current international investment law supports the investors rather than the interests of the citizens at area in which invested. it should be noted that the national rules and the current bilateral and regional treaties in relation with foreign investment have addressed supporting from investment regardless of the environmental and human rights challenges. while the international investment has been assumed as one of the major pillars of economic development together with adverse environmental and human rights outcomes. Personal and economic interest is the aim of investment law and human interest is the aim of environment law, but scope on performing both laws relates to an environment. the foreign investors tend to investing in the countries which easier environmental rules, whereby economic costs reduce for capital- exporting countries. the bilateral treaties which have been signed between countries have not referred to environmental issues and have less likely attributed starting investing to compliance with environmental rules, but multilateral agreements have been made on this field such as northern America agreement which was signed aiming at evaluating environmental outcomes of transnational investment and trade. This treaty created a commission to assess NAFTA's environmental performance. In fact, this Commission has enabled citizens to file a complaint against a member state due to its violation of environmental law. but this mechanisms has not had sufficient effectiveness, because recommendations by this commission had not been binding and the country can deny violation of environmental principles to continue their behavior(Ziaei, 2014, pp. 191-210).

European Energy Charter (ECT) also implies two obligations: the obligation to protect foreign investment and commitment to reduce environmental damage. But this agreement has not announced also environmental assessments of foreign investment as the condition to start the investment. Today, foreign investors have been accused of destruction in their host countries by factors such as polluting rivers, destroying forests, damage to human health. Indeed, imposing environmental rules on investment rights in developing countries is of great importance due to several reasons:

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A) investment flows towards these countries, b) people in these countries are more vulnerable, c) governance in these countries to manage resources is weaker; it should be noted that in bilateral treaties to encourage and support foreign investment, the investor usually do not take guarantee of investment for encroaching the environment and residents, and even the conditions in the treaties such as a prerequisite for stability, balance and arbitration clause are in conflicting with the necessity to protect the environment, considering the fact that the scope of the prerequisite for stability is not certain and the necessity to no change in rules can include the environmental rules. Prerequisite for balance was created against prerequisite for stability in order that the governments enable to change their rules in line with the public interests provided that the compensation to the investor is paid. Yet this condition worked inverse on protection from environment and reduced the possibility to enhance the environmental rules, because this condition converts the principle for pollution cost to the cost for combating with pollution. Prerequisite for arbitration has been targeted in supporting the foreign investors and if the citizens or the third parties are harmed by agreement on investment, no way has been predicted for their involvement. Since foreign investment has been the old concern by governments and investors and environment has been the new concern by humans, the international investment law should be modified in favor of international environment law, for which the strategies below are suggested:

1-governments should put emphasis on environmental considerations in agreements and treaties in a more serious way; the necessity to protect from environment at the investment area against the outcomes from investment is that there must be a systematic investment process worldwide, in such a way that negative outcomes on environment diminish.

2-the international environmental law should be defined under the principle of national behavior and the government should be obliged for legislation at national area, knowing these obligations applicable for the foreign investor.

3-set rules for protection from environment must be made by capital- exporting countries in order that the foreign investors fail to damage to environment for their economic interests by selecting the countries which have easier rules. In doing so, capital- exporting countries help for protecting from environment by setting extra-territorial legislation;

4-since the main aim of foreign investor is to increase development, welfare and economic growth in the communities and since having healthy environment is the main condition to achieve this aim, the international investment should be developed in a way to have the least negative effect on environment;

5- Responsibility of the host government and national state of investor to destroy the environment by foreign investor can help for protecting from environment.

6-attention to satisfaction by people with settlement in investment environment goes beyond the notification in trade agreements.

7-protection from environment should be the precondition for arrival of foreign investor in order that he fails to pass various stages after arrival of foreign investor by giving scores to the government

Ultimately it should announce that the globalization of law governing international investment without control on destructive outcomes arising from investment process will fail. In other words, dynamic development in foreign investment law in globalization requires acceptance of stepping forward the borders and moving towards sustainable development.

Conclusion

With regard to study on status of aliens' rights, an emphasis was put on this pint that the aliens' rights in customary international law have been arisen from the international behavioral standards in the bilateral invest-

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ment treaties. bilateral investment treaties despite taking effective step in development in law governing foreign investment, have failed due to environmental and human rights challenges. Thus, the best way to reduce environmental damages and not to avoid international investment process is having compliance with environmental assessments in domestic rules on investment in Capital- exporting countries. Further the principles on compliance with environment should be taken into account in treaties. To sum up, the protection form investor including Lending or tax and customs exemptions is required for compliance with environmental obligations by investor.

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