Makale Gönderim Tarihi: 17/02/2019 - Makale Kabul Tarihi: 28/05/2019

THE DEVELOPMENT OF INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT SYSTEMS

Esra YILDIZ ÜSTÜN*

Abstract

Foreign direct investment is currently one the fastest growing parts of international law. It has increased due to the proliferation of bilateral investment treaties (BIT). The contribution of the BITs has ensured the protection of foreign investors and investment. In other words, in cases where there is a dispute, the investor will settle the dispute before the impartial and independent arbitration tribunal instead of the courts of the host state. Thus, BITs limit the host states' sovereignty by providing arbitration method. Although the introduction of arbitration method is considered to be a big step after the Second World War, it cannot be said that it solves the fundamental problem over the time. Before the war, when an investment dispute arose, the investor was used to go to the court of the host state and see the sovereignty power. After the war, investor has been encountered the same effect in the execution of the arbitral award in the host state. Therefore, the focus of the article will be on the history of international investment law based on dispute settlement systems of BITs compared with historical investment dispute settlement systems. In addition, it is argued that the application to arbitration does not change the result of state sovereignty. It may signal future problems in this field since it causes revisiting to the court system. The most obvious example of this is the efforts to establish a multilateral investment court.

Keywords: *FDI, State Sovereignty, The World War II, ISDS*

ULUSLARARASI YATIRIM UYUŞMAZLIKLARI ÇÖZÜM YÖNTEMLERİNİN GELİŞİMİ

Öz

Doğrudan yabancı yatırım günümüzde uluslararası hukukun en hızlı gelişen alanlarından biridir. Bunun nedeni ise 2. Dünya Savaşı'ndan sonra ortaya çıkan ikili yatırım anlaşmaları olmuştur. Bu yatırım anlaşmalarının katkısı yabancı yatırımcıyı ve yatırımını korumayı garanti etmesidir. Diğer bir değişle uyuşmazlık çıktığı durumlarda artık yatırımcı, yatırım yaptığı ev sahibi devletin mahkemelerinde değil, tarafsız ve bağımsız tahkim hakem heyeti önünde uyuşmazlığı çözüme kavuşturabilecektir. Böylelikle, asıl sorun olan devlet egemenliğini sınırlandıracaktır. Her ne kadar tahkim yönteminin gelmesi, 2. Dünya savaşından sonra büyük bir adım olarak kabul edilse de zaman içerisinde sonuç bakımından bir farklılık yaratmadığı görülmektedir. Savaştan önce yatırımcı uyuşmazlık çıktığında baştan ev sahibi devletin mahkemesine giderek egemenlik baskısını görürken, savaştan sonra tahkim sonrası alınan kararın ev sahibi devlette icrasında aynı etkiyle karşılaşmaktadır. Bu nedenle bu makalede 2. Dünya Savaşı öncesi ve sonrası yabancı yatırım uyuşmazlıklarının çözüm yöntemleri karşılaştırılarak, aslında savaş sonrası tahkime başvurulmasının devlet egemenliğinin azaltılması noktasında sonucu değiştirmediği savunulacaktır. Bunun da yatırım tahkiminin geleceği için büyük bir tehlike arz ettiği çünkü savaş öncesi gibi mahkeme sistemenine dönüş olduğu görülmektedir. Bunun en belirgin örneği de milletlerarası yatırım mahkemesinin kurulma çalışmalarıdır.

*Öğr. Gör. Dr., Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi, Milletlerarası Özel Hukuk, This article is produced from the author's PhD Thesis. esra.ustun@erzincan.edu.tr, https://orcid.org/ 0000-0003-4106-4812.

Anahtar Kelimeler: *Doğrudan Yabancı Yatırım, Devlet Egemenliği, 2. Dünya Savaşı, Yatırımcı-Devlet Uyuşmazlık Çözümü*

Introduction

John N Jackson describes the development of international economic law as being 'like trying to describe a landscape while looking out of the window of a moving train - events tend to move faster than one can describe them'.[1] Foreign direct investment (hereafter 'FDI'), known as international capital in literature, refers to the contribution of a country's investor to the existing capital stock in another country by bringing technology, know-how, business knowledge or only by buying stocks and bonds in the foreign country (Boğa, 2017: 4). There is a highly competitive market worldwide for FDI (Douglas, 2009:1). The success of each state in that market depends upon a number of aspects, but the stability and predictability of its regulations for foreign investments are of great importance (Douglas, 2009:1). However, these attributes that are expected from nascent states after the Second World War are unrealistic. Therefore, the development of foreign investment might be analyzed in two stages – before the Second World War and after the Second World War.

It is generally agreed that foreign investment was an inherently international movement. Before the Second World War, it was entirely dependent on national laws and domestic courts. In that era, the vital issue was to safeguard foreign investors from host state power, given that the host state could bring all disputes with investors before its own courts. Individuals might demand diplomatic protection from their home state even after resolution of the dispute. It appears that the investor had no remedy of his/her own (Kaushal, 2009:491). Thus, the investor would be subject to the municipal law of the host state and to customary international law (Kaushal, 2009:492). In addition to this, the host state might expropriate the foreigner's investment without any compensation. The investors had no opportunity to initiate their disputes in an international, objective and impartial setting. They were obligated to resolve them in naturally partial national courts because in that era it would not have been accepted that a host state would enforce the national court decisions of other states in its own territory. This would have gone against the idea of state sovereignty due to the perceived equality between states. Therefore, before investing in a state, a foreign investor had to consider carefully all factors and risks as a prudent merchant.

After the Second World War, the situation began to shift gradually (Kaushal, 2009:499). Newly independent, yet economically dependent, states emerged. Although these states and developing states needed foreign capital to develop, there was strong protectionism (Dolzer and Stevens, 1995:1). Developed countries were reluctant to invest in other countries, even though they were looking for new markets to sell their products and technology (Vandevelde, 1998:373). There was a chaos and capital-exporting countries demanded guarantees for safeguarding their investment and investors. In order to remove this chaos, states tried to draft multilateral treaties and conventions but these were not approved among the states and so bilateral investment treaties (hereafter 'BITs') started to be negotiated (Dolzer and Stevens,

[1]John H. Jackson, *Legal Problems of International Economic Relations* (3rd Edition, West Publishing 1999) as cited in C Tietje et al, 'Once and forever? The legal effects of a denunciation of ICSID' (2008) <http://www.wirtschaftsrecht.unihalle.de/sites/default/files/altbestand/Heft74.pdf> accessed 29 March 2017.

1995). These BITs are easier to draft, redraft and focus on both states' interests instead of requiring several states to negotiate on rules.

Despite this protectionist atmosphere, the BIT regime has grown steadily, in particular during the 1990s (Vandevelde, 1998:621). BITs have shifted priorities from protecting state sovereignty to servicing foreign investors' interests (Kaushal, 2009:501). In other words, capital-importing countries have exchanged their sovereignty for credibility in order to capture foreign capital (Kaushal, 2009:501). BIT is an international legal tool that allows two states to determine the rules that will govern investments by their own nationals in the others' territory (Gottwald, 2006:1804). This improvement has been seen as a way to avoid state sovereignty at the beginning but it cannot be adequate to prevent state power pressure, especially at the enforcement stage of arbitral awards. This is owing to the fact that investment arbitral awards have faced the issue of sovereign immunity and also public policy obstacle at the last stage of the arbitration process. While comparing the new investment dispute settlement mechanisms and old mechanisms, it is sometimes found that the outcome of the dispute settlement systems may sometimes be similar even though results of awards are different. In both situations, the host states' court decisions are in favour of the state; meanwhile non-enforceable arbitral awards have the same results for foreign individuals in practice.

Therefore, this article argues that there is a tendency to turn back to the court system in foreign investment field owing to the fact that arbitration, which has been come into the area after the Second World War, and which has not been sufficient for the investor parties in practice. There are many scholars who state investment arbitration will disappear over time because state sovereignty problem cannot be resolved by the post the war dispute settlement method. In order to understand the current problems, it might be useful to examine the background of these treaties and compare the old and new dispute settlement methods in pre and post-World War II. In order to examine the background of international investment law and dispute settlement approaches in this context, this article is organized in the following way. Firstly, the origin of BITs is considered by discussing the evolution stages, namely before World War II and after World War II. Secondly, it will explore the innovations in the old types of dispute resolution mechanisms and current dispute settlement mechanisms. Finally, it will attempt to contribute to the ongoing debate over whether the current situation of dispute settlement regimes is adequate to provide stability to investment arbitration in BITs.

1. THE HISTORY OF INTERNATIONAL INVESTMENT LAW

There has been a remarkable increase in the number of agreements concluded that relate to the protection or liberalization of foreign investment over the past two decades (Vandevelde in Sauvant and Sachs, 2009). BITs trace their origins back to the treaties of friendship, commerce and navigation (hereafter 'FCNs') concluded by the United States over the centuries (Akgül, 2008). FCNs were used for the expansion of international commerce and the improvement of US foreign relations, with some investment provisions being included later (Neumayer and Spess, 2005). However, BITs are more focused on foreign investment.

During the Second World War, Germany lost almost all its foreign investment and so it signed the very first BIT with Pakistan in 1959 (Neumayer and Spess, 2005;1569: Egger and

Pfaffermayr, 2004) The flow of FDI has rapidly increased in the past several decades to transform into a major force in funds and technology, in particular for developing countries (Neumayer and Spess, 2005;1568). Private international flow of financial resources has become of increasing importance to developing countries (Neumayer and Spess, 2005;1568). As can be observed above, the development of BITs, which was divided into two stages, led to a significant change in the flow of FDI.

1.1. Before the Second World War

Prior to the Second World War, international agreements did not often include the protection of FDI. It was common for most international agreements to be for trade relations, though they sometimes added provisions on the protection of alien property (Vandevelde in Sauvant and Sachs, 2009;158).

Recent analysis reveals that this era gave rise to several features of USA FCNs, including the centrality of property rights, the Calvo doctrine and customary international law. As early as the eighteenth century, FCN bilateral treaties were starting to be concluded; the aim of these was to launch trade relations with its treaty partners. FCNs had provisions guaranteeing 'special protection' or 'full and perfect protection' to the property of nationals of one party in the territory of another. They also required compensation for expropriation and provided to the nationals of one party 'most favored nation' (hereafter 'MFN') status and national treatment regarding the right to engage in certain business activities. Additionally, FCNs provided restricted protection for currency transfers (Vandevelde in Sauvant and Sachs, 2009;158-159). Yet, as previously indicated, the main focus was on protecting property as opposed to investment.

In terms of the principal source of rules for the protection of foreign investment in the mentioned era, there was customary international law which binds host countries to treat investments under minimum international standards (Neumayer and Spess, 2005;1572). However, customary international law was inadequate for the protection of foreign investment. This was due to the fact that some countries argued that customary international law imposed an international minimum standard on the treatment of foreign investment. In particular, Latin American countries adhered to the Calvo doctrine, under which foreign investors were only subjected to the treatment that the host country afforded to its own nationals (Vandevelde in Sauvant and Sachs, 2009;159).

1.1.1. Calvo Doctrine

As indicated by the name of the clause, it was formulated by the Argentinian diplomat and legal scholar Carlos Calvo in the mid-1800s to deal with European diplomatic intervention in Latin America (Dalrymple, 1996). In order to understand why this clause emerged, it is necessary to understand the person behind it. He worked as vice-consul of Montevideo in 1852 and then became consul-general and diplomatic representative of Buenos Aires from 1853 to 1858 (Bordwell, 1906). Subsequently, he became deputy of the lower house of Buenos Aires in 1859 and then worked as Paraguay charge d'affaires in Paris and was also accredited in the UK (Bordwell, 1906).

As an influential figure in the field of foreign investment, he was one of the founding members of the Institute of International Law, established in 1873; in parallel with it, he was

selected correspondent of the Institute of France in 1869 and a foreign associate of the same institute in 1892 (Bordwell, 1906). At the beginning of the 1800s, Latin American nations had just become independent and sought foreign investment. To achieve this, these countries guaranteed equality of treatment with their own nationals to attract investors from Europe and the USA (Dalrymple, 1996;163).

However, this plan failed due to a defaulting bonds issue. In other words, the bond issue affected most of the foreign companies launched to conduct business in the host states' territories, leading to their collapse in 1833. In the following years, foreigners and nationals were subject to economic losses. Therefore, foreigners appealed to their governments for relief by using diplomatic intervention or armed force owing to the inability of Latin American governments and courts to safeguard foreigners' properties (Dalrymple, 1996). Thus, the home states began to use diplomatic intervention in the form of treaties and state practice, for example. While these interventions were expanded, Carlos Calvo headed off the interventions by formulating the Calvo doctrine. The aim of the doctrine was to serve the host states' interests. It includes two main propositions. The first is the 'national treatment standard', which provides that foreigners can apply to the host state's national courts to settle their dispute like nationals of the host state (Cremades, 2004). In addition to this, if the host state's rules provide compensation due to expropriation, foreign investors can receive it (Bubba and Rose-Ackerman, 2007). The second one is the 'diplomatic intervention' provision that forces home states not to enforce their nationals' private requests by breaching the state sovereignty of host states with diplomatic or forceful intervention (Dalrymple, 1996; 163). The Calvo doctrine influenced some early BITs, affirmed by a couple of Latin American states by placing preconditions on the initiation of the settlement of investor-state arbitration in provisions (Cremades, 2004;78). For instance, foreign investors had to exhaust domestic judicial remedies in order to commence the arbitration process (Schefer, 2016;408).

However, after the 1970 Andean Commission Foreign Investment Code and the 1974 United Nations Conference of Economic Rights and Duties of States (Szasz, 1971;264), which demonstrated Latin America's approach to resolving investor-state disputes, the Calvo doctrine lost its effectiveness and new BITs no longer include this clause which requires the exhaustion of local remedies (Schreuer, 2007; 345-358). This was due to the fact that even though the clause was placed in treaties with European nations, they were not successful so the clause was used among Latin American states. Thus, a development that was attributable to the fact the Latin American states put in their agreements the Calvo clause, a development that was attributable to the fact that the clause forces foreign investors to agree upon waiving their rights (Shea, 1955). However, while investors were forced to waive their rights, diplomatic intervention ultimately challenged the validity of the clause (Dalrymple, 1996;166).

The goal of the Calvo doctrine was to eradicate the foreign state's actions in favour of its own nationals (Dalrymple,1996;51). This doctrine was an enemy of foreign investment and although some states, for instance the UK and USA, did not apply this clause under international law, they had doubts that it might affect their national investors that invested in foreign countries (Dalrymple, 1996; 44-45). As can be seen, the doctrine was a strong obstacle for foreign investment because it did not serve the investor's interests. It is clear that the clause was intended to protect the Latin American states in that period by Carlos Calvo.

However, it did not work as expected as the clause was perceived to be unfair and a reason for a drop in FDI.

1.1.2. Customary International Law

Despite the fact that investment treaties govern international investment law, customary international law still has an effect on it (Dolzer and Schreuer, 2008). Customary international law also has a close relation to the practice of investment arbitration. Obligations established on attributions and also other fields of state responsibility prove this point. Customary international law provides protection to the investor against the unfair actions of the host state (Al-Adba, 2014). According to many scholars, BITs make customary international law stronger, for instance, compensation for alien's property expropriation (Kishoiyian, 1994). The famous example is the Hull formula, which claims that compensation should be 'prompt, adequate and effective' (Vig and Gajinov, 2016; Guzman, 1998). Capital-exporting countries see this formula as an expression of customary international law (Schwebel in Ginsburg, 2005). Customary international law lacked established principles so it was contentious for states. This confusion was expressed by Judge Schwebel:

Capital-exporting States generally maintained that host States were bound under international law to treat foreign investment, at least in accordance with the 'minimum standard of international law'; and where the host State expropriated foreign property, it could lawfully do so only for a public purpose, without discrimination against foreign interests, and upon payment of prompt, adequate and effective compensation. Capital importing States maintained that host States were not in matters of the treatment and taking of foreign property bound under international law at all; that the minimum standard did not exist; and that States were bound to accord the foreign investor only national treatment, only what their domestic law provided or was revised to provide. The foreign investor whose property was taken was entitled to no more than the taking State's law afforded (Schwebel, 2006).

1.1.3. Historical Investment Dispute Settlement Methods

Before BITs were drafted, international investment disputes were resolved in two ways: national courts and, much less frequently, diplomatic protection.

A) National Courts

In order to settle international investment disputes, host states' national courts, where the investment was made, were used. In addition, conflict rules generally referred to these national courts (Dolzer and Schreuer, 2008; 213) because it was considered that it was better to judge the disputes where the investment was made. In other words, the dispute was considered to have a close relation to the state in which the investment was made (Dolzer and Schreuer, 2008; 214). This situation also meant that the foreign investor was subject to the host state's municipal law and the dispute was governed by an already partial court.

Initiating investment disputes before the host state's court had some advantages such as legitimacy, transparency and accountability that other dispute settlement mechanisms did not have. Further, there were some states that already had experience and experts in investment disputes to resolve these. However, this might also not be the case as foreign investment

generally flows from developed countries to developing countries. Therefore, developing countries' courts may not be reliable because the courts are inexperienced and their legislations are not adequate to govern the international investment disputes. Furthermore, national courts may be bound by their governments to enforce unfair legislation on foreign investors as the local judicial system is part of the state (Al-Adba, 2014; 161). Some scholars claim that ignoring national courts may prevent improvements being made to domestic courts in that field, a particularly important consideration given that strong national and international judicial institutions would be expected to attract foreign investors (Ginsburg, 2005; 118). In addition, it might be considered that although the national courts' decision is less complicated to enforce, it is absolutely different in practice. In terms of foreign investors, it is unrealistic to believe that a foreign individual would win a case against the host state in its territories. Even if this did happen, the obstacle of immunity from execution would be met at the last stage. As for a third state, another national courts' verdict is also hard to enforce due to public policy and state immunity (Dolzer and Schreuer, 2008; 235-236). The third state, in functioning in accordance with its own sovereign act.

B) Diplomatic Protection

The other method was diplomatic protection which considered the home state as the party, instead of the foreign investor, against the host state. Foreign investors did not have direct access to international remedies against the host state following a breach of their rights (Dolzer and Schreuer, 2008; 232). They were dependent on their own governments to protect them on an international level. Hence, they had to attempt to persuade their home states to protect their rights in such international affairs. There were conditions to meet in order to gain diplomatic protection from a home state. The foreign investor had to be a national of the state providing diplomatic protection (whether an individual or corporation) (Dolzer and Schreuer, 2008; 233). There is a controversial point discussed in doctrine. While some scholars assume that a foreign investor had to be a national of a protecting state continuously from the time of the violation until the claim, others assert that it was until the dispute was resolved. The host state must accept to protect its national in the international platform. A final requirement for an application for diplomatic protection was that the local remedies in the host states had to be exhausted by the foreign investors. However, this requirement was frequently violated by foreign investors (Murphyt, 1991). The process of diplomatic protection, after being accepted by the home state, involves negotiation as a primary step. Unless negotiation is fruitful, the protecting state may take the dispute to the International Court of Justice (hereafter 'ICJ') (Dolzer and Schreuer, 2008).

i) International Court of Justice (ICJ)

It may be useful to introduce the Court in regards to its functionality in settling international investment disputes. As an organ of the United Nation (hereafter 'UN'), the Court was established after the Second World War (in June 1945) and in April 1946 became the main judicial organ of the UN (Butler, 2012). The Court is the successor of the Permanent International Court of Justice (hereafter 'PICJ'). The Court has two functions. It resolves international disputes and can give advisory opinions on legal issues which may be referred to by other UN organs or authorized agencies. The Court has fifteen judges who are elected for a

period of nine years by the UN General Assembly and Security Council (Butler, 2012; 243). Until 1982, the full Court, consisting of its fifteen regular judges, supplemented in some cases by ad-hoc judges, had heard every case decided (Murphyt, 1991;441). Only states can bring a case before the court. The court's decision is final and binding on parties.

The states signatories to the UN Charter must conform to the decisions of the Court; otherwise, the winning state may refer the matter to the Security Council (Butler, 2012; 245). The Security Council has the power to determine which measures must be taken for compliance with the decision of the Court. These processes are the regular duty of the Court but there are several deviations, such as provisional measures, consolidation rights and deciding whether it has jurisdiction or not when a party claims the absence of jurisdiction (Butler, 2012). As indicated earlier, it is only seldom that cases come before the ICJ regarding investment disputes but it is essential to analyze the old dispute resolution methods through well-known cases.

ii) ELSI case

This case was brought before the ICJ under an investment treaty FCN by the US against another developed country (Choi, 2007). The purpose of analyzing this case is to understand the inadequacy of the ICJ mechanism in investment disputes. Therefore, the merits of the case and the resolution mechanism of the Court will be briefly examined.

The US filed an application with the ICJ because Italy had violated an FCN. The US government complaint was that the requisition by Italian authorities of a US company's Italian subsidiary (ELSI) prevented the subsidiary's orderly liquidation and forced it into bankruptcy. In response to this, the Italians denied breaching the FCN treaty and added that, even if they had, payment of damages was unnecessary since ELSI was already bankrupt when Italy attached the assets (Guilds, 1992).

The issue here is whether the attachment of the assets was arbitrary or not. There are several reasons that exist that suggest that the settlement mechanism of the Court was inadequate. The first is that the Court is constituted of fifteen judges from different countries with no shared perspective (Hamrock, 1992). The countries have inherently different governmental and legal systems. Therefore, each judge contributes to the Court his/her view on the legitimacy of certain governmental actions. In other words, even though the combination of different legal backgrounds may be valuable for the Court's reputation, such as improving new international law principles to accommodate conflicting cultures and traditions, it is obvious that this makes the phrase 'shocks the juridical conscience' an infeasible standard by which to measure arbitrariness. The second issue is the Court's arbitrariness test, which uses conscience as a standard (Hamrock, 1992;849). This means that a previous decision on whether the conduct of a government is arbitrary or not will not be used as precedent for the next case relating to the arbitrariness of another government's action. This precludes predictability and stability; upon this basis, it is the court that should determine a particular test of arbitrary actions (Hamrock, 1992;850). In addition to this, the court has not rendered an award regarding compensation of damages (Murphyt, 1991;439). Diplomatic protection and the ICJ process are the last stages of the settlement of investment disputes, which are equally time-wasting. The *ELSI* decision will undoubtedly be a benchmark example in the future evaluation of property protection (Murphyt, 1991). In other

words, ICJ decisions are mostly not supported by adequate enforcement mechanisms, so the court decisions are assumed as a 'symbolic' rather than 'fully enforceable authority', although they are binding on the disputing parties for the certain dispute ((Choi, 2007;740-741).[2]

In light of these facts, the mentioned obstacles call for the construction of new alternative dispute settlement mechanisms. The ICJ has addressed few controversial legal issues related to foreign investment disputes and so, as seen in the *ELSI* case, there have been some procedural and substantive inadequacies in the diplomatic protection model in protecting shareholder's interests. Hence, these complexities and inadequacies may have led to the development of international investment agreements (hereafter 'IIAs') (Bishop, Crawford and Reisman, 2005). It was the opposing opinions of judges Oda and Schwebel in the *ELSI* case which emphasized the need for IIAs to address the extent to which investors holding shares in a corporation incorporated in a host state are qualified to claim for infringements of an IIA where the state measures in question are directed at the locally incorporated company. The case proved that the diplomatic protection mechanism was slow and burdensome (Bishop, Crawford and Reisman, 2005;378-379).

1.2. After the Second World War

Politics created international norms on foreign investment protection and also played a crucial role in the development of this field (Miles, 2013;9). As global political conditions shifted in the aftermath of the Second World War, the first consequence of the war was an economic depression (Bishop, Crawford and Reisman, 2005). Also, many believe that the protectionist policies of the 1920s exacerbated the situation and so the victory of the war reached a consensus in favor of liberalizing trade (Hoekman and Kostecki, 2009). In 1947 consensus, the conclusion of the General Agreement on Tariffs and Trade (hereafter 'GATT') shifted the legal framework for international commerce relations from bilateral to multilateral agreements. In addition, GATT introduced a motion that sought to achieve worldwide trade liberalization. However, GATT could not achieve the goal for the investment. The investment needed to be framed outside of GATT, which to a large extent meant separately from trade (Vandevelde, 1998).

Post-war US FCNs assured 'equitable treatment' and the 'most constant protection and security' to the property of foreign individuals and corporations (Vandevelde, 1998). The property could not be expropriated without payment of compensation. It is clear that post-war FCNs included some innovations. First, they extended treaty protections to corporate entities. Second, the post-war agreements regularly covered protection against exchange controls. The most essential modification was that these agreements included a dispute resolution provision, which meant the host country could be subject to the jurisdiction of an international tribunal without its consent (Gallagher in Mistelis and Lew, 2006). Investment protection for the first time had become a primary goal of the FCN agreements after the Second World War (Salacuse and Sullivan in Sauvant and Sachs, 2009). Yet, the USA recognized that a bilateral treaty for investment protection was necessary.

[2]Article 94 of the UN Charter (recourse to the Security Council is only available option in noncompliance situations).

1.2.1. Formalising the Regulation of International Investment Regime

The second significant effect that formalized the international investment regime of the post-war period was the process of decolonization (Landes,1999). New and undeveloped countries wished to protect their independence and they saw foreign investment as a form of neo-colonialism as it involved foreign control over the means of production (Hanink, 1994). However, it was also the case that foreign investment was vital to their economic independence. Therefore, many developing countries isolated themselves from foreign investment and adopted an import substitution policy (Vandevelde, 2005).

Furthermore, the emergence of the socialist bloc led by the Soviet Union had an effect. Following the war, socialist countries started to experience massive expropriations of the private sector, including foreign assets. The Soviet Union also encouraged developing countries to take the view that economic relations with the developed countries of Western Europe and North America would be inherently exploitative and that the best way to reach economic development was to choose extensive state regulations for the economy rather than the free market (Vandevelde, 2005).

Developed countries since World War II have struggled to create international norms to facilitate and protect the investments of their nationals and companies abroad. These efforts have occurred at bilateral and multilateral levels. The first step was the Havana Charter of 1948 but it could not gain support from a sufficient number of states partly due to opposition from the business community (Salacuse and Sullivan in Sauvant and Sachs, 2009). Subsequent steps were the International Chamber of Commerce's International Code of Fair Treatment of Foreign Investment (1949), the International Convention for the Mutual Protection of Private Property Rights in Foreign Countries (1957), a private effort known as the Abs-Shawcross Convention, and the Organization for Economic Cooperation and Development (hereafter 'OECD') Draft Convention on the Protection of Foreign Property (1967). Despite these proposals not being adopted, they did influence the development of the BIT movement that was to come (Salacuse and Sullivan in Sauvant and Sachs, 2009).

A new and important phase in the historical development of modern international investment law began in the late 1950s as individual European countries started to negotiate bilateral treaties. These countries sought to create a basic international legal framework to govern investments by nationals of one country in the territory of another. Switzerland, France, the United Kingdom, the Netherlands and Belgium followed in relatively short order (Salacuse and Sullivan in Sauvant and Sachs, 2009). As can be seen from its history, BITs originated within global needs, even though some countries closed themselves off to foreign investment. This is because that almost all BITs include an arbitration option between the contracting states. Further, a state-to-state dispute may prevent a state-investor arbitration from going forward until a home state-host state dispute is settled (Dolzer and Schreuer, 2008;234). Apart from investor-state arbitration, other dispute settlement mechanisms still exist in BITs (national courts, diplomatic protection). It can be stated that almost all BITs include an arbitration option between the contracting states. Further, a state-to-state dispute may prevent a state-investor arbitration from going forward until a home state-host state dispute is settled (Dolzer and Schreuer, 2008,234). Apart from investor-state arbitration, other dispute settlement mechanisms still exist in BITs (national courts, diplomatic protection). However, they are not used as before. In terms of arbitration under BITs, there are two

options for parties – ad-hoc arbitration and institutional arbitration. Therefore, it will be examined that what is the only different option, arbitration, as more specific. The aim of the arbitration method is to create an unbiased, objective and impartial dispute settlement system for foreign investors as a weaker side against the host state. Also most BITs include the arbitration option to give the home state's investors guarantee. According to the UNCTAD reports, 2,946 BITs by year-end in 2017 have been signed (UNCTAD, 2018;88). As seen the evolution of the investment dispute settlement systems, arbitration under the BITs replaces the other dispute settlement mechanisms in a short time (Miles, 2013:1).

However, there are still issues regarding the sovereignty of host states especially in enforcement stage in practice. This is because that arbitration awards have difficulties in practice regarding enforcement procedure in the host states. This problem can be seen clearly in the attachment of the host state's assets. This is owing to the fact that only state's commercial assets can be seized and the host state decides whether the assets is public or commercial in accordance with its regulations. Hence, if the state does not tend to pay the award in favor of the investor, it is hard to attach the state's assets in its own country. Then, investor starts to seek the host state's assets in the third enforcing states (forum-shopping). This process causes several problems like high-cost, time wasting. The well-known examples *are Sedelmayer case, LETCO v Liberia Case, AIG Capital Partners, Inc. v Republic of Kazakhstan* Case. In light of this, this problem has been considered to turn back to the courts procedures like before the Second World War. Because the courts have power to enforce their decision on the states but tribunals have no power on it. The current debate on establishment of multilateral investment court might be demonstrated as an example of this tendency. The UNCITRAL has set up a working group, which is currently considering the EU proposal which is establishing a multilateral investment court. The working group will identify and consider concerns which relate to investor–State dispute settlement (hereafter 'ISDS'); in doing so, it will consider if reforms are desirable in light on identified concerns; in the event that the Working Group concludes that reform is desirable, it will also work to develop and recommend any relevant solutions (Lavranos, 2017).

Conclusion

This work has sought to differentiate between old investment dispute settlement methods and current methods by analyzing the periods prior to and after the Second World War. While examining these differences, dispute settlement methods were mentioned as well as the evolution of the investment agreements such as origins of BITs and how they rapidly proliferate globally over a short period of time. Besides, it is seen that disputing parties tend to use the old dispute settlement method.

The history of foreign investment dates back to the post-World War II era. It is older than BITs. The end of the war brought the second phase of decolonization, which culminated in the collective assertions of sovereignty by developing countries (Kaushal, 2009:499). There were several reasons for the BITs trend, namely, World War II, a lack of guarantee for foreign investors in previous investment agreements and also the progress of development. Before the Second World War, foreign investment was not popular and there was no special agreement type for it. It was only semi-protected thanks to FCNs and IIAs. In that era, foreign investors did not have direct access to international adjudication. They had two options to look for

resolution. The first one was that foreign investors had to bring their disputes before the host state's national courts. The second was that if their home states agreed to offer diplomatic protection for its nationals against the host state, then they were defended by their own state. The downside was that every decision in the case (such as negotiations and the financial award was under home state control). However, most states are generally reluctant to offer diplomatic protection even if they become parties in the dispute. Thus, host state sovereignty was stronger before the war, with the foreign investor suffering from the weaker side of the investment dispute mechanism.

In order to develop, capital-importing countries started to provide more protection to foreign investors while capital-exporting countries found markets in which they could sell their products thanks to their technology. For this reason, it was necessary to restrict state sovereignty. The states had to commit some protection that foreign investors' demands. One of these conditions is that when a dispute arises, the foreign investor is able to access international mechanisms for settlement even though they may be hindered by the state's exercise of its sovereignty. The idea behind this was that there should be a balance between protection of state sovereignty and protection of foreign investor's interest in accordance with international law. In order to provide this, many developing states considered concluding bilateral investment treaties. BITs have reduced the level of sovereign risk by putting in place a regime of international minimum standards for the exercise of public power by the host contracting state in relation to investments made in its territory by the nationals of another contracting state (Dolzer and Schreuer, 2008). Furthermore, BITs provide foreign investors with the opportunity to defend themselves in the international arena. In other words, before the advent of BITs, developing countries signed state contracts with investors that included arbitration clauses but these agreements were governed by municipal law. This approach was changed by redrafting concession agreements in an internationalized form, starting in the 1950s (Kaushal, 2009:496).

To conclude, the evolution of investment dispute settlement methods is demarcated along historical lines – pre and post-World-War II. As can be understood from previous sections, there has been a remarkable change in favor of internationalized dispute settlement approaches since the war. There were a number of reasons that precipitated this innovation. This has also resulted in the reduction of state sovereignty although investment arbitration awards still face the issue of sovereignty even though they have disposed of national obligations and courts. Foreign investment has benefited from BITs but the situation could be improved further. Despite dispute settlement methods being different during both periods (before and after the War), the outcome has been the same in that foreign investors are restricted by host state sovereignty. Even though arbitration method has been brought to the investment field as a solution to more flow of FDI, it cannot be served the needs of the states and foreign investors in time. After the war, arbitration under the BITs has been seen as a solution to protect the foreign investor and investment but now the same problems which was faced before the war such as state sovereignty effect in practice. The only difference from the before the war is the stage of the issue. Before the war, developed states' investors were reluctant to invest the undeveloped or developing countries because there is no guarantee to protect their investment. Particularly, when the dispute between the host state and foreign investor comes up, the investor has to settle the case before the host state's national courts.

After the war, this effect has been seen after the arbitration process but the result is the same. Therefore, it could be claimed that states prefer to settle their investment disputes before the international courts. The European Union has recommended establishing an investment court. The multilateral investment court proposal might be interpreted as a warning bell on future investment arbitration.

References

AIG Capital Partners, Inc. v. Republic of Kazakhstan (AIG, Inc.), [2005] EWHC (Comm) 2239, [22], [2006] 1 WLR 1420 3

Akgul, Z. (2008). "The Development of International Arbitration on Bilateral Investment Treaties: Disputes Between States and Investor, ICSID Cases Against Turkey Regarding Energy Sector" (Universial Publishers 2008) available at: <http://www.bookpump.com/dps/pdf-b/9426692b.pdf> accessed 15 January 2013.

Al-Adba, N M. (2014). "The Limitation of State Sovereignty in Hosting Foreign Investments and The Role of Investor-State Arbitration to Rebalance The Investment Relationship", (University of Manchester) 181.

Bishop, R D. Crawford, J. and Reisman, W M. (2005). *Foreign Investment Disputes: Cases, Materials, and Commentary*. KIL.

Boğa, S. (2017), Finansal Kırılganlıklar ve Uluslararası Sermaye Hareketleri: Gelişmekte Olan Ülkeler Üzerine Bir Analiz. *Finansal Araştırmalar ve Çalışmalar Dergisi,* 9(16), 1-17.

Bordwell, P. (1906). Calvo and the Calvo Doctrine18 Green Bag 377-381.

Bubba, R J. and Rose-Ackerman, S. (2007). Bits and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment" 27 Int'l Rev.L.& Econ. 291–311

Butler, N. (2012). "The State Of International Investment Arbitration: The Possibility Of Establishing An Appeal Mechanism" The University of Leeds, School of Law

Choi, W M.(2007). The Present and Future of the Investor-State Dispute Settlement Paradigm 10.3J Intl Econ L 725-747.

Cremades, B M. (2004). "Disputes Arising Out Of Foreign Direct Investment In Latin America: A New Look At The Calvo Doctrine And Other Jurisdictional Issues" 59 Disp.Resol.J. 78.

Dalrymple, C K. (1996). Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause" 29 Cornell Int'l L.J. 161.

Dolzer, R. and Schreuer, C. (2008). *Principles of International Investment Law*, OUP

Dolzer, R. and Stevens, M. (1995). *Bilateral Investment Treaties*. KIL

Douglas, Z. (2009). *The International Law of Investment Claims*. CUP

Egger, P. and Pfaffermayr, M. (2004). "The Impact of Bilateral Investment Treaties on Foreign Direct Investment" 32 Journal of Comparative Economics 788.

Gallagher, N. "Parallel Proceedings, Res Judicata And Lis Pendens: Problems And Possible

Solutions' in Mistelis, L M. and Lew, J DM. (2006). *Pervasive Problems in International Arbitration*. KIL

Germany No. 91 / W1, Franz J. Sedelmayer (Germany) v. Russian Federation, Federal Republic of Germany, Bundesgerichtshof [Federal Supreme Court], 4 October 2005.

Ginsburg, T. (2005). "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance" 1 IRLE 118.

Gottwald, E J. (2006). "Leveling the Playing Field: Is It Time for a Legal Assistance Centre for Developing Nations in Investment Treaty Arbitration?" Bepress Legal Series Working Paper 1804.

Guilds, J C. (1992). ""If It Quacks Like A Duck:" Comparing The ICJ Chambers To International Arbitration For A Mechanism Of Enforcement" 16 Md.J.Int'l L.& Trade 43.

Guzman, A T. (1998). "Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilatreal Investment Treaties?" 38 Va.J.Int'l L. 640.

Hamrock, K J.(1992). "The ELSI Case: Toward an International Definition of "Arbitrary Conduct"". 27 Tex.Int'l L.J. 837.

Hanink, D M. (1994). *The International Economy: A Geographical Perspective*. J. Wiley

Hoekman, B M. and Kostecki, M M. (2009). *The Political Economy of the World Trading System: The WTO and Beyond.* OUP

Jackson, J N. (1999). *Legal Problems of International Economic Relations.* West Publishing.

Kaushal, A. (2009). "Revisiting History: How The Past Matters For The Present Backlash Against The Foreign Investment Regime". 50 Harv.Int'l L.J. 491.

Kishoiyian, B. (1994). “The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law”. 14 Nw. J. Int'l L. & Bus. 327.

Landes, D S. (1999). *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor.* WW Norton & Company.

Lavranos N, ‘The first steps towards a Multilateral Investment Court’ (13 July 2017) see from < http://www.ciarb.org/news/ciarb-news/newsdetail/news/2017/07/13/the-first-steps-towards-a-multilateral-investmentcourt-(mic)> last accessed 16 November 2017.

Liberian E. Timber Corp. v. Gov’t of the Republic of Liberia (LETCO I), 650 F Supp 73 (SDNY 1986), aff’d 854 F2d 1314 (2d Cir 1987)

Miles, K. (2013). *Origins of International Investment Law: Empire, Environment, and The Safeguarding of Capital*. CUP.

Murphyt, S D. (1991). “The ELSI Case: An Investment Dispute at the International Court of Justice” 16 Yale J.Int'l L. 391.

Neumayer, E. and Spess, L. (2005). “Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?”. 10 World Development 1567.

Salacuse, J W. and Sullivan, N P. “Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain” in Sauvant, K P. and Sachs, L E. (2009). *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. OUP.

Schefer, K N. (2016). *International Investment Law: Text, Cases and Materials*. Edward Elgar Publishing.

Schreuer, C. (2007). “Investment Protection and International Relations’ The law of international relations—Liber amicorum Hanspeter Neuhold”. Eleven International Publishing 345-358. http://www.univie.ac.at/intlaw/wordpress/pdf/87_investment_protect.pdf> last accessed 10.11.2017.

Schwebel, S M. (2004). “Influence of Bilateral Investment Treaties on Customary International Law”. 98 ASIL 27.

Shea, D R. (1955). *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy.* University of Minnesota Press.

Sauvant, K P and Sachs L E. (2009). *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and İnvestment Flows*. New York: Oxford University Press.

Szasz, P C. (1971). "The Investment Disputes Convention and Latin America" 11 Va.J.Int'l L. 256.

UNCTAD, World Investment Report 2018, https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf last accessed 08.05.2019.

Vandevelde, K J. (1998). "Sustainable Liberalism and the International Investment Regime" 19 Mich.J. Int'l L. 373.

Vandevelde, K J. (1998). 'The Political Economy of a Bilateral Investment Treaty' *92 the American Journal of International Law,* 621.

Vandevelde, K J. (2005). 'A Brief History of International Investment Agreements' 12 UC Davis J. Int'l L. & Pol'y, 157.

Vig Z and Gajinov, T. (2016). 'The Development of Compensation Theories in International Expropriation Law' 57 *Hungarian Journal of Legal Studies,* 447–461.