Settlement Agreements as a Waiver in Investment-State Arbitration Aryan Tulsyan

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Introduction

Most International Investment Agreements ("IIAs") contain a specific dispute settlement clause, providing access to avenues such as investment arbitration and domestic courts to the investors. A waiver in the context of Investor-State Dispute Settlement (ISDS) refers to the waiver of protection offered by an IIA. It means that the investor-claimant *waives* their right to approach an investment arbitral tribunal which has been established by the governing IIA, with regards to claims that may arise against the host state (defendants). There exists literature on the constitution of a waiver upon selection of domestic forums (see Hoffman, Spiermann) and on *Calvo Clauses,* present in Latin American Investor-State concession contracts, as per which the rights of a foreign investor are limited to availing the host state's local legal remedies and a waiver of investment arbitration. However, this article does not analyze waivers in the context of *Calvo Clauses* or available local remedies. The article elucidates whether settlement agreements between a host state and a foreign investor would qualify as a waiver of the investors' claim before an investment-arbitral tribunal.

Situating waivers in ISDS?

It is important to situate the principle of waivers within relevant international law sources. Article 38(i) of the ICJ Statute, provides for conventions, customs, and general principles of law as sources of international law. Article 45(a) of the Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA") states that a State's responsibility may not be invoked if the injured State has waived a claim. Although Article 45 of the ARSIWA does not address private entities, it mentions the waiver of the 'State' and can be used as a source to locate the principles of waivers in international investment law.

Although IIAs are usually silent on the issue of waivers, commentaries have interpreted the dispute resolution clauses in IIAs to argue that a right cannot be waived before it can be exercised. Further, although a waiver cannot be presumed, it has been noted that waivers can also be implied (see *Håkansson and Sturesson v. Sweden*, Russian Indemnity Award). Christopher Schreuer has also argued that '*if the right to take the host state to arbitration is a right of the investor and the investor alone',* waivers cannot be forbidden.

Does the IIA necessarily need to contain a waiver clause?

The arguments above can be used as a source to situate waivers as a principle of international law (Article 38(i) of the ICJ Statute). Now, it is important to understand how an arbitral tribunal can determine if they are bound by a waiver. While most IIAs do not have explicit provisions dealing with waivers, they have a broad dispute settlement clause, which would mean that the Tribunal would have the authority to decide on disputes based on the principles and rules of international law. (for example, Article 26(6) of the ECT, Article 30(1) of the US Model BIT). Thus, if the Tribunal is to apply the principles and rules of international law, they would not entertain a claim by an investor who has waived such rights, as waivers are a principle of international law. Therefore, the absence of an explicit waiver clause in the IIA becomes irrelevant if the IIA has a dispute resolution clause allowing it to use international law.

Settlement Agreements as Waivers

As per *Aguas del Tunari v. Bolivia*, an investor who agrees to a settlement agreement with the host state is said to commit to a waiver of such claims, which extends to the arbitral tribunal established by the IIA (para 118). This decision can be used to support the claim that settlement agreements would amount to a waiver of protection offered by an IIA.
As per the ECHR dispute of *Barbera v. Spain*, waivers must be established unequivocally and must not run counter to any important public interest (para 82). Therefore, the settlement agreement which is to be constituted as a waiver must be unequivocal. An unequivocal settlement agreement could mean one which is based on consensus between the parties, concerning all material terms and arrangements.

If a settlement agreement is to constitute a valid waiver, it must not have been obtained through coercion or duress. In *Anaconda v. Iran*, the Chilean Government nationalized mines operated by Anaconda Company, to which the latter agreed, on the fear of expropriation of investment. The Tribunal decided that even though Anaconda's agreement to the rearrangement of the investment might amount to an implicit waiver of treaty protection, Anaconda will be allowed to submit claims before the arbitral tribunal as the settlement was concluded under duress, and the settlement would not amount to a waiver. Therefore, if the host state coerced the investor to enter into a settlement agreement, or in situations where the latter is under duress, the settlement agreement would not be a valid waiver.

In *Desert Line v. Yemen*, the Tribunal found that the terms of the settlement agreement were extremely unfavourable for the investor, which had been "imposed onto the Claimant under physical and financial duress" and had been a result of "coercion" and "inadmissible pressure". Thus, one way to determine if the settlement agreement is a result of coercion or duress is by perusing its terms. *De Rendón v. Ventura* employed the concept of *laesio enormis* which allows a party to rescind an agreement if there is an unfair consideration. Therefore, if the terms of the settlement agreement suggest that there is an unjustified and colossal difference between the quantum of the settlement and the original investments, it can be implied that the settlement was a result of duress or coercion, which would allow the investor to rescind the agreement and make claims before the arbitral tribunal as no valid waiver would be established.

Contract Claims and Treaty Claims

A way to determine the existence (or refutation) of a waiver could be by determining if the relevant claims concern the specific contract between the foreign investor and the host state (and its agencies), or if they concern the IIA in general. Usually, investment arbitration tribunals are concerned with the protection of foreign investors when the host state has breached the IIA and not the contract. This is based on the sixth commentary on Article 4 of ARSIWA, as per which the breach by a State of a contract does not as such entail a breach of international law. Here, the author argues that if there is a juridical distinction between the IIA and the contract, a waiver of a contract might not always mean to be a waiver of the protection of the IIA.

As per *Vivendi v. Argentina I*, a breach of an IIA and that of a contract are 'different questions' (para 96), even if they arise from the same factual circumstances (para 576 of *Sun Reserve v. Italy*). Based on this, principally, investment arbitration tribunals do not have jurisdiction over purely contractual claims (para 557 of *Deutsche Bank v. Sri Lanka*), as there is a distinction between contractual and treaty claims. In *Burlington v. Ecuador*, although the investors waived the claims under the contract, the Tribunal held that "they have not waived the underlying rights (established by the IIA), and Burlington may thus rely on these underlying rights to pursue its Treaty claims in this arbitration" (para 365). Therefore, a contractual waiver would not preclude the investor to approach the arbitral tribunal, as the investor's rights are protected by the IIA. To determine if a claim would classify as a contractual claim or treaty claim, one could consider multiple factors such as the cause of the claim, content of the right, parties to the claim, applicable law, and the host State's responsibility. If a claim falls within treaty jurisdiction, contractual waivers will not preclude investors. In certain situations, the host State might act as a sovereign authority and not as a contracting party; here, if the investor waives its contractual claims, it would still be protected by the IIA, as there could be a breach in other substantive standards of protection found in the IIA. (para 77 of *El Paso v. Argentina*).

Investment arbitral tribunals can have jurisdiction over disputes arising from a breach of contract even if the IIA is not breached, if the IIA's dispute resolution clause is broadly worded, to include "all disputes concerning investments". In such cases, the investment

arbitral tribunal would have jurisdiction over contract claims (*Teinver v. Argentina*), and it can be argued that the waiver of the contractual claims would ultimately mean the waiver of the IIA protection. One such example is Article 8(1) of the Argentina - France BIT (1991), under which the Tribunal has jurisdiction over "any dispute relating to investments". Provision for contractual jurisdiction through the IIA can also be established under the Claims Settlement Declaration. This was reiterated in *Toto v. Lebanon,* where the investor had signed a contractual waiver and claimed that this should not be treated as a treaty waiver, but the Tribunal held that when a claim concerns the same damage for the same act, an investor's waiver through the contract precludes them from recovering under the IIA (para 85).

Aim of the IIA

If the nature of the settlement agreement between the host state and foreign investor is outside the aim of the IIA, it can be argued that the settlement agreement would not be a waiver of claims before an arbitral tribunal. For example, most IIAs like the ECT or the US Model BIT, have provided in their preambles that the IIA seeks to enforce investors' rights by facilitating arbitration of disputes. The IIAs seek to hold the host states responsible for any breaches of obligations made by them. On the other hand, settlement agreements could be limited to the forbearance of repayment obligations, not accounting for the mistreatment meted out to the investors. For example, Company A might enter into a settlement agreement with Country X, through which A decides not to recover investments from X. However, if the IIA governing the investment made by A in X provides protections such as Most Favored Nation or National treatment, and X has violated these protections, then the settlement agreement between A and X would not be a waiver of claims before an arbitral tribunal. 'A' might not be able to seek the value of the investment, but A may claim that the host state treated them in a manner inconsistent with the IIA. In situations like these, where the aim of the IIA is broader than the scope of the settlement agreement, certain agreements would not constitute a waiver of claims before an arbitral tribunal.

Conclusion

There are multiple ways to resolve investor-state disputes, and sometimes, the parties can decide to enter into settlement agreements through negotiations. The standing of these settlement agreements concerning investment arbitration is not a widely addressed issue. This paper has attempted to analyze the situations in which the settlement would and would not be a waiver of the protection by an IIA. Arbitration rests on the tenet of party autonomy, which becomes important here as the decision to establish arbitration as the official dispute resolution mechanism is of the parties. As the settlement, and the arbitration, are decisions of the parties themselves, there rises a conflict, and this article has aimed to resolve this conflict. To conclude, once it has been established that a

settlement agreement can be treated as a valid waiver, there needs to be a case-by-case analysis to determine if such a waiver would preclude an investor from approaching an arbitral tribunal.

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