CRITICAL ANALYSIS OF REFLEXIVE LOSS CLAIMS IN INTERNATIONAL INVESTMENT DISPUTES

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Abstract - *In contemporary times corporations are aggressively making international investments in diverse economic activities. Private corporations seek protection for their investments under international investment treaties. They raise claims under international investment treaties for recovery of compensations for the losses resulting from the actions of the host state regulatory agencies. The right to claim compensation should ideally be available and exercised only by investor corporations. But in certain cases, the shareholders of the investor corporation have also raised claims, for the recovery of losses incurred by the reduction in the share prices. Such claims by shareholders are called reflexive loss claims.*

In this paper, the authors have adopted the normative doctrinal research method, for examining the enforceability of reflexive losses claims by the shareholders of the investor corporation under an international investment treaty. Most of the matured jurisdictions practice the rule of "no reflexive losses claim" as a matter of policy in their investment law disputes. Accordingly, there is a sense of legal uncertainty internationally regarding the enforceability of reflexive losses claims under international investment treaty. Further the authors in this paper have also tested the feasibility of private ordering solutions to reflexive claims issues.

To carry out the analysis, the authors have framed the following research questions –

"R.Q. 1" - Whether Reflexive losses claims by the shareholders against the actions of the host state are enforceable under investor-state investment disputes?

"R.Q. 2" – Is the private ordering solution feasible for preventing the shareholder from raising the Reflexive losses claims?

The authors have used graphical and diagrammatic presentations for explaining the technical aspects of reflexive loss claims. The analysis has revealed that the enforceability of reflexive losses claims is under a dilemma and a sense of uncertainty prevails regarding it. Further the solution of private ordering is legally valid option to overcome reflexive losses claims. But it has chilling effect on the other treaty provisions relating to investment protection.

Keywords – *Reflexive Losses, Investment Treaty, Investment Law, shareholders, private ordering*

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1. INTRODUCTION TO THEME OF RESEARCH

In contemporary times corporations are aggressively making international investments in diverse economic activities. Private corporations seek protection for their assets under international investment treaties (IITs) (Sngryan, 2022, p. 37). They raise claims for recovery of compensations for the losses resulting from the actions of the host state regulatory agencies (Durguti, 2022, p. 46). The right to claim compensation should ideally be available and exercised only by corporations. But in certain cases, the shareholders of the corporation have also raised claims for the recovery of losses incurred by the reduction in the share prices of the corporation. Such claims by shareholders are called reflexive loss claims.

The reflexive loss claims by shareholders are discouraged and not allowed as a matter of public policy by most of the mature jurisdictions of common law and civil law nations (Schreuer, 2005, p. 4). The principal argument against the reflexive losses claims by the shareholders is that the actual losses are incurred to the private corporation and not to the shareholders; in fact, the losses incurred in terms of reduction in share prices are an indirect consequence or reflection of the losses incurred to the corporation.

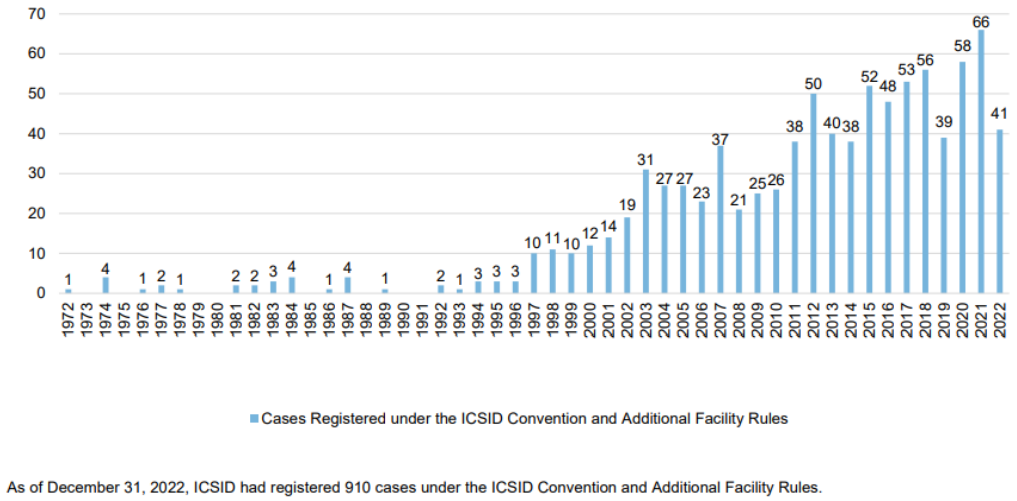

Figure 1: ICSID Cases registered between 1966 to 2022

In the last decade, the number of disputes between international investors and host states has raised substantially. Figure 1 highlights the data on investment disputes raised before the International Center for Settlement of Investment Disputes (ISCID) each year, from 1972 to 2022 is highlighted (Gaukrodger 2020). The data reveals that gradually there is a rise in the number of international investment disputes; it also highlights the relevance of an effective enforcement mechanism for the arbitration awards resulting from investment disputes. The investment disputes concerning reflexive loss claims are decided by the ISCID or other arbitration institutions, but the respective awards are not effectively enforced. They are majorly declared unenforceable, as they are alleged to be against the public policy of the national jurisdictions of host states. Therefore, there is a need for examining the enforceability of reflexive loss claims and proposing a feasible solution to settle the legal position on enforceability.

In this paper, the authors have critically analyzed the concept of reflexive losses claims by the shareholders of the investor corporation under an investment treaty dispute resolution mechanism. There is an ambiguity regarding the enforceability of reflexive loss claims raised by the shareholders of claimant corporations. Most matured jurisdictions practice the rule of "no reflexive losses claim" as a matter of policy in their investment law disputes (Mather, 2008). Accordingly, there is a sense of legal uncertainty internationally regarding the enforceability of reflexive loss claims under international investment treaties.

Scholars have advanced solutions to overcome the problem of reflexive loss claims by shareholders, including rearranging the provisions of investment treaties or limiting their applications. In this line, renowned scholar Vera Korzun suggested “The solution of Private Ordering” for overcoming the problem of reflexive loss claims in his seminal paper. (Korzun 2018,189). The said solution calls for making the subsidiary contractual arrangements to limit the application of IITs and not allow the shareholders to raise claims. Though it appears an apt solution, it has some serious fundamental flaws and negative implications for investor protection goals. Therefore, the authors in this paper have also examined Vera Korzun's solution and critiqued it. Further, the authors have borrowed the analytical framework from the seminal works of Julian Arato (Arato, 2016, p. 440) and Ian Ayres (Ayres, 2012, 2084) to construct their central argument.

Accordingly, the focus of this paper is twofold – (1) critically analyze the enforceability of reflexive loss claims, (2) test the feasibility of private ordering solutions to reflexive claims issues. To carry out the analysis, the authors have framed the following research questions –

"R.Q. 1" - Whether Reflexive losses claims by the shareholders against the actions of the host state are enforceable under investor-state investment disputes?

"R.Q. 2" – Is the private ordering solution feasible for preventing the shareholder from raising the Reflexive losses claims?

2. ANALYZING THE ENFORCEABILITY OF SHAREHOLDER'S RIGHT OF REFLEXIVE LOSS CLAIMS

This segment aims to answer the "RQ1". It will analyze the concept of reflexive loss claims and assesses its enforceability under international investment treaties. The shareholders can suffer the losses of the investments they have made in the investor company in two broad ways (1) direct or (2) indirect losses. Direct losses arise when shareholders' rights are restricted or denied, including the right to vote, the right to receive shares in the event of corporate dissolution, or the right to dividend payments. In such a case, the shareholders have the right to sue the third parties for direct losses; this is a standard corporate practice in significant jurisdictions like the U.S., UK, Germany, and Netherlands (Korzun 2018,198).

In the case of indirect losses also called reflexive losses, which originate from indirect or remote causes to the shareholders. Let us consider the following scenario: An oil and gas firm named Zeta has invested in the U.K. to explore oil and gas from offshore operations. However, because of the climate emergency, the government of the U.K. has decided to seize the company's operations. In the given case, the company has suffered direct losses in the form of losing its property, revenue, and investment rights. However, it is also possible that the said government order has caused a decline in the share values of the said investor company. The valuation of the shareholder's shares has decreased due to the decline in share prices, and they may have suffered losses. However, the nature of such losses will be indirect, and these are called the reflexive losses suffered by the shareholders of a company (De Jong, 2013, p. 97).The reflexive losses are sourced from a remote cause and are not the direct consequence of the alleged act.

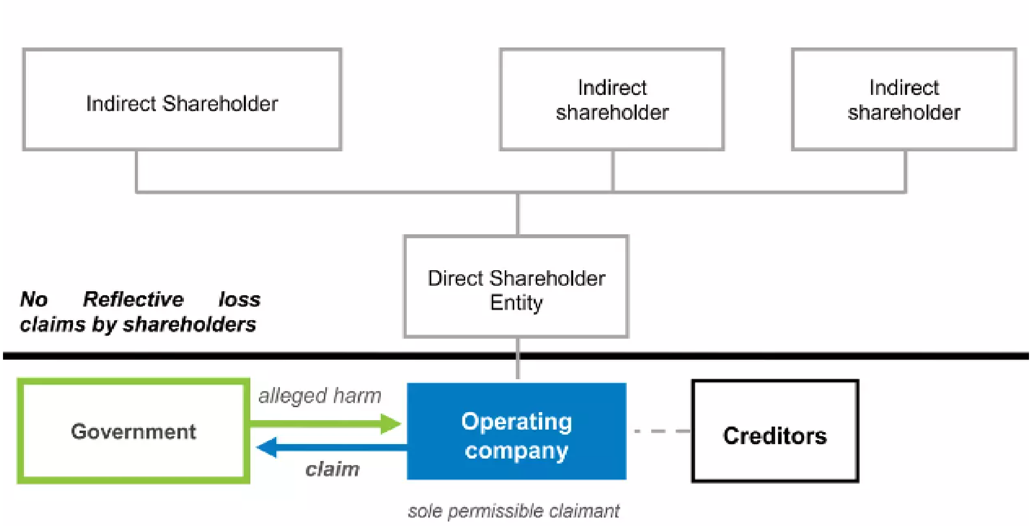

Figure 2: The principle of "No Reflective Loss"

The "no reflexive loss concept" and the prohibition on shareholders bringing claims for indirect losses are the norms under the domestic laws of advanced legal systems, such as those in the United Kingdom, the United States of America, Germany, Australia, Canada, China, and France, among others (Korzun 2018,199). Figure 2 is the diagrammatic presentation of the no reflexive loss principle (Gaukrodger 2020).

The concept of no recovery for reflexive losses forbids the recovery of any form of indirect losses. The said losses are incurred by the company and not by the shareholders. The principle of a corporation being separate from its owner and having its assets and liabilities independent from its owner is the normative basis for the refusal to allow the recovery of reflective loss claims (Kraakman, 2009).The refusal to allow the recovery of reflective loss claims supports the company's autonomy and the interests of other stakeholders, including creditors concerned about the company's financial difficulties (Korzun, 2018, p. 200).The refusal to reflexive loss claims is also justified by the fact that it avoids several lawsuits and concurrent claims from many parties against a single corporation, as well as a duplicate discovery for the exact cause of action (Demirkol, 2015, p. 399).

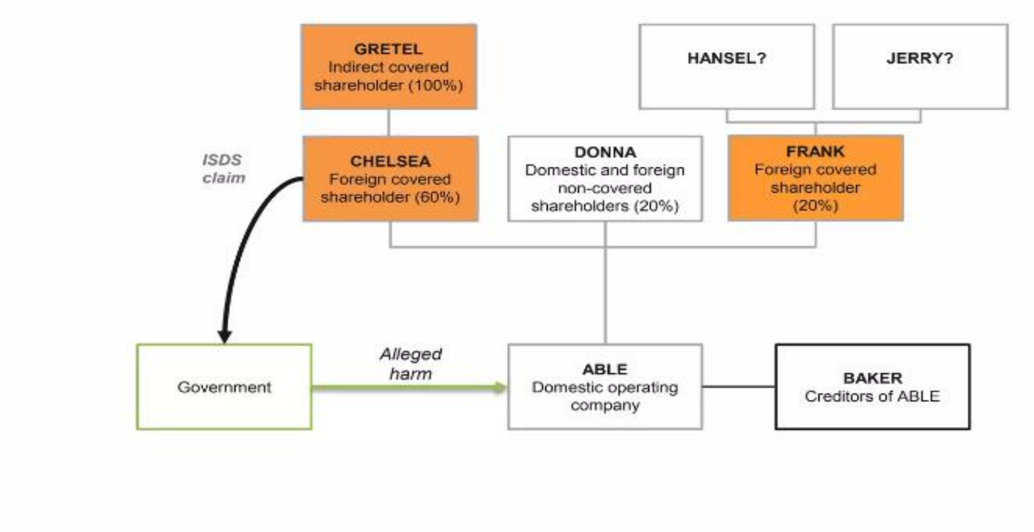

Figure 3: The Claim for Reflective Loss

Figure 3 is the diagrammatic presentation of reflexive loss claims by shareholders of the claimant corporation (Gaukrodger 2020). The claim for reflexive losses is more complex and disputed in international investment laws and treaty procedures than in domestic laws. The definition of the terms investment and investor include the equity shareholdings and the shareholders of the investor company within the scope of treaty protection. These terms are expensively defined in modern investment treaties (Gaukrodger, 2014). If we analyze the international investment agreements of the early 1990s, they have an inclusive definition and only include foreign direct investments within their ambit. It is startling that the terms investment and investors need to be covered and defined by the International Convention on the Settlement of Investment Disputes (ISCID). Article 25(1) of ISCID defines the terms in a minimal sense of understanding. It is left to the discretion of the individual state party to define the following terms according to their needs in their respective investment treaties (Mistura, 2019).

Let us examine contemporary investment treaties, such as the bilateral investment treaty. They define the term "investment" in an inclusive way that includes holding a company's shares as an investment. Thus investments are defined as any asset that an investor directly or indirectly owns or controls and which possesses essential features of an investment, including the commitment of capital or other resources, the expectation of gains or profits, or the assumption of risk (Schreuer, 2005, p. 44). These characteristics are listed in Article 1 of the U.S. model BIT. This U.S. model BIT also includes a list of the assets that fall under the definition of an investment, such as shares, equity stakes in businesses, or bonds and debentures. The majority of modern investment treaties contain similar definitions of the term investment (UNCTAD 2015). Additionally, according to UNCTAD's mapping effort, only 25 out of 2,577 international investment agreements specifically exclude portfolio investments from the scope of the investment treaty. This also includes the claims made by the equity shareholders, holders of debt-based securities, and all other classes of investors who are included in the definition of investors and are eligible for seeking the treaty protections.

In the international investment treaty practice, the arbitration centers have frequently acknowledged the claims made by the equity shareholders for the reflexive losses they have incurred in disputes between the investor company and the host state government. Recently, this practice has become widespread for arbitration centers and tribunals to recognize investor claims for reflexive losses. Whether the treaty allows the shareholders to raise the claims independently of the firm is becoming common in investment disputes. Tribunals consider claims regardless of whether they are for direct or indirect losses if the treaty permits it (Korzun, 2018, p. 215).

The main problem with the investment tribunals' practice of recognizing the shareholders' claims for reflexive losses is that it conflicts with the domestic norm of not allowing such claims. At the domestic level, most of the advanced legal systems follow the no reflexive loss principle; on the contrary, at the international level, investment tribunals allow reflexive loss claims. This has also affected the trends of corporate practices at the regional and domestic levels of various countries. Learned scholar V. Korzun has discussed this issue in the seminal paper and suggested solutions to overcome it.

According to V. Korzun, the practice of tribunals allowing claims for reflexive losses has a detrimental impact on corporate laws and governance procedures inside the domestic realm of states. This is also producing problems, such as the simultaneous filing of claims for the same loss by the shareholders and the firm in two separate arbitrations, which weakens the company's position and limits its ability to bring the issue up with the host state.

Thus, the existing IITs have defined the term "investment" broadly, which includes portfolio investments like equity shares and debentures as a form of investment. Also, let us closely analyze the practice of investment arbitration in admitting the claims. Investment arbitrators are admitting the claims of shareholders of investor corporations for reflexive losses. While at the domestic level, the states are following the policy of no reflexive loss claims. This creates a conflict where the claims for reflexive losses are admitted and entertained under the international investment treaty. On the contrary national courts are discouraging the enforcement of the said claims.

Such a conflicting situation leads to legal uncertainty on the status of reflexive loss claims and their enforcement. It is not in the interest of the host state or investor corporation that such legal uncertainty prevails in international investment dispute resolution.

Scholars have suggested a solution to overcome the legal uncertainty and limit the shareholders from raising the claims of reflexive losses. In the next section, the authors will critically analyze the proposed private ordering solution by V. Korzun. The authors will check the feasibility of the proposed private ordering solution within the wires of international investment law.

3. FEASIBILITY TEST OF “PRIVATE ORDERING SOLUTION."

V. Korzun established the private ordering approach in his foundational work to resolve the issue of claims for reflexive losses made by the investor company’s shareholders. V. Korzun suggested that the corporation can incorporate the targeted provisions in the company's governing documents to handle the issue of the shareholder claim for the reflexive losses. Such targeted provisions will restrict the shareholders' rights to file claims under the investment treaty. Additionally, the language stating that any investor protection remedies granted in the event of a state's breach must go only to the investor business can be infused in the investment treaties. According to V. Korzun, this option is only feasible if the arbitral tribunal gives precedence over such contractual waivers over the rules of investment treaties.

Let us assume the company ABZ is incorporated in the U.K. and has invested in India by entering into an investment contract with a state entity to make it crystal clear. Now, assume that U.K. and India have a BIT that allows shareholders of the company to qualify as the investor and their respective holdings as the investment. So accordingly, the shareholders of ABZ have the right to bring the claim under the BIT against the state. V. Korzun has suggested that by private ordering, the company ABZ can adopt a clause in its governing documents like a Memorandum of association or Article of association, which provide for the waiver of the shareholder's rights under the investment treaty (BIT) to raise the claim for any indirect losses. So in case of any dispute, the shareholder may not be able to raise the claims under the treaty for any indirect/reflexive losses (Mather, 2008).

However, the private ordering solution raises the more important question of whether the contracting parties to an international investment agreement can make such agreements that circumvent the treaty's requirements and curtail their applicability (Arato, 2016). A thorough analysis of the relationship between the subsidiary investment contract and international investment agreements with the investment firm and shareholders is necessary to understand this issue comprehensively. Why do the two interact with one another, and can one be given absolute precedence over the other, or do both require a unified interpretation?

The authors hereby question the feasibility of the private ordering solution and its impact on investment treaties. Let us make it clear upfront that by legality, authors mean (1) that whether the solution of private ordering is to be allowed in the context of international investment law, (2) even if allowed, then how efficient it will be to have it in the international investment law practice? This two-prong feasibility test will be the basis of our analysis of private ordering solutions (Vanhonnaeker, 2020, p. 15).

The private ordering solution focuses on the subsidiary investment agreements between the investors and the shareholders, like the MOAs and AOAs of the relevant company. The rights of shareholders to raise claims under international investment treaties can be legally restricted and limited through incorporating provisions in the corporation's governing documents. Such provisions will expressly state that the company's shareholders will not be eligible to raise the claims for any indirect losses of any kind against the host state under the concerned investment treaty. It also proposes that the arbitral tribunals interpret the investment treaty terms consistent with the subsidiary contracts between the parties and grant them a priority.

On similar lines, Arato contends in a significant study that the reasoning supporting the inclusion of subsidiary investment contracts inside the ambit of investment treaty protection is different from that supporting property-based protection. The subsidiary investment contracts are protected to ensure that each party has the freedom to decide how their risks will be distributed and the terms of the transaction. Arato has further indicated that in a dispute, the tribunals should give such agreements preference over treaty terms to protect the subsidiary investment contract and that the parties should be allowed to make agreements that are not constrained by treaty restrictions. Arato argued that the parties to an investment contract ought to have the freedom to decide their rights and obligations beforehand. In doing so, they ought to be entitled to limit or restrict the applicability of the investment treaty articles to suit their needs (Arato, 2016, p. 398).

The intriguing assertion made by Arato is that the international investment treaty is taking on the shape of a universal law of contracts, one that genuinely fulfills the same function as our domestic contract law. It provides the ability for the parties to create a personalized investment contract while outlining the general rights and obligations of the parties. The investment treaty should therefore fill in any gaps that may occur and serve as the fundamental guidelines for establishing investment contracts. Arato has reorganized the norms by placing investment treaties as the leading standard and subsidiary investment contracts as the primary norms to govern the parties and their related rights and obligations.

Arato's two arguments –

1. The protection of subsidiary investment contracts under investment treaties is justified by the need to preserve the parties' freedom to negotiate the terms of the investment transaction. Therefore, the applicability of investment treaty terms must be subject to limitation or modification by the parties. I will refer to this as the Logic argument.

2. The second justification is that investment treaties are becoming the primary international investment contract law source. As a result, the parties must be permitted to draught investment contracts using investment treaties as the guiding principles. This argument represents a linguistic ordering of the norms, with investment contracts as the principal norm and investment treaties as the background norm.

These two arguments explain the relationship between the investment treaty and subsidiary contracts. The logical argument explains that including the subsidiary investment agreements within the scope of investment treaty protection is to preserve the party's autonomy. The norm ordering argument explains the relationship in the context of the applicability of investment treaties and subsidiary investment contracts. Both these arguments, if read in tandem, give the argument of allowing the parties to contract around the investment treaty provisions and let them enter into subsidiary contracts to modify the applicability of treaty provisions. The fulcrum of this argument lies in the parties' autonomy to decide the terms of the investment transactions and the role of investment treaties, which make them a guiding norm. The argument of *Arato* is the foundation for the private ordering solution.

The primary benefit of these arguments, as stated by *Arato,* is that the parties are the best suited to decide their relative rights and obligations in the transactions and their capacity to take risks. The investment treaty provisions add the transaction costs and let the parties decide how to allocate this cost between them. It is different from the function of investment treaties to define each party's obligations strictly. Instead, BIT has loose definitions to allow the parties to frame their subsidiary investment contracts within four corners of such BITs.

Arato has also recognized the value that the parties to an investment treaty are not permitted to renounce any investment protection provisions through subsidiary contractual agreements. Arato has therefore claimed that the logical argument and the argument for norm ordering cannot be equally applicable to all of the investment treaty's provisions. To examine their relative value and importance to the goals of investment treaties, one must further categorize them.

According to Ian Ayres' classification system, which divides treaty provisions into three major groups, it is possible to group and analyze investment treaty provisions according to their relative importance and values. (1) The first are default clauses, which are added on top of land fill in any gaps in the treaty clauses. The parties can exclude them from consideration or restrict their application by entering into subsidiary contracts. (2) The second set of rules is unavoidable under the treaty's terms because they are supported by sound reasoning and moral principles (Ayres 2012, 2032). Typically, these standards pertain to environmental contamination or equitable remuneration, where the issue of justice or fairness is raised. (3) The third category of norms is sticky default rules, which fall in the center of the other two. These rules can be changed, but only under extreme circumstances. The implementation of Arato's reasoning and understanding of the relative relevance of treaty clauses depend on these three types of rules. These further emphasize that not all provisions should be given the same weight; some may be waived off by the parties while others cannot (Arato, 2019, p. 34).

Thus, the authors use the analytical framework consisting of (1) Arato's prong arguments and (2) Ayres's classification of clauses for the feasibility test of the private ordering solution.

The authors, at this moment, contend that the private ordering solution should be examined using Arato's two arguments and Aryse's three-fold classification. Let us begin with the logic and norm ordering arguments put out by Arato. When we read them together, the concept of private ordering that is based on investment treaty terms is not inherently flawed. The parties can negotiate a contract using the investment treaty as a guideline. Additionally, as they are better positioned to distribute the risks associated with investment transactions effectively, the parties can limit or restrict the applicability of specific treaty provisions. To this extent, the private ordering solution of *V. Korzun* is feasible as it is possible to have such a contractual arrangement.

Since we have already defined the understanding of the term "Feasibility," which includes (1) a test related to validity and (2) a test related to efficiency, let us discuss it in detail. So concerning the first part of the feasibility test, which is validity based, the private ordering solution is valid because parties can validly contract around the investment treaties to limit or alter the applicability of the treaty provision. Therefore, parties must be provided with sufficient freedom to decide the terms of investment contracts to facilitate the transactions. Another justification for this argument lies in *Arato's* norm ordering argument, where the role of international investment treaties has been characterized as background norms playing the gap-filling roles (Claussen, 2019).

The next part of the analysis is the efficiency-related test for which we use the Ian Ayres three-fold classification of treaty provisions. This classification brings clarity regarding the relative importance of the treaty provisions. Therefore, the questions related to which of the treaty provisions cannot be waived off and which can be can only be answered after considering the relative importance of the provisions.

As we already discussed, the core of the private ordering solution lies in allowing the waiver of the treaty provisions by entering into subsidiary contractual arrangements. Therefore, it is essential to analyze the relative importance of treaty provisions and measure the implications of their waiver before waiving them.

To exemplify our point, suppose the private ordering solution applies in the context of environmental obligations, and parties agree to waive off the requirement of compliance as given under the investment treaty for their respective investment transaction. Now, in this case, this cannot be allowed as the treaty's provisions related to environmental protection have a relatively higher value than other provisions; also, the cost of environmental degradation is much higher. This could not be the case in the context of the fair market value of compensation in case of losses. As such, provisions can be altered, and the cost has to be shared by the parties and not by the community.

As already discussed, *Ayres* has proposed threefold classifications of a default rule: mandatory and sticky default. Provisions like environmental norms and expropriation norms must be covered under mandatory rules, and these cannot be waived. To put it more generally, any provision the waiver of which can directly and substantially affect the twin objectives of the investment treaty, which are (1) protection and (2) promotion of foreign investment, will fall under the mandatory rule. A moderate version of the mandatory rule is the sticky default provisions which can be waived off but in exceptional cases only. Moreover, the last one is the flexible default rule, which can be waived.

Suppose we apply this to V. Korzun's private ordering solution for the reflexive loss claim issue. In that case, the primary question is precisely which investment treaty provisions will be waived off by it? Moreover, if the provisions which are waived off by the private ordering solutions fall under the default rule category, only then is it an efficient solution to tackle the reflexive loss claims. Therefore, if the private ordering solution has a chilling effect on multiple provisions belonging to all three categories of Ayres, then it is not efficient.

To do the private ordering for tackling the problem of reflexive loss claims, one has to restrict the scope of the definition of the terms “investment” and “investor” in the investment treaty because we have already discussed that the shareholders and their equity shareholdings are covered under the respective definition terms. However, the issue is more complex and limited to these two definitional investment treaty terms.

Let us take an example, suppose the shareholders of a company XYZ have raised their claim for the reflexive losses under the expropriation clause. If any subsidiary contract exists for waiving off the rights of such shareholders to make claims, then this might have multiple chilling effects. Such a waiver will not restrict the application of definitional terms like "investment" and "investor." Instead, it will affect the applicability of mandatory rules like the expropriation provision of the treaty. Therefore, the private ordering solution will have multiple chilling effects if applied in the context of reflexive losses.

We now state our principal argument against the private ordering solution, as suggested by V. Korzun, that the given solution is a valid proposition in the context of international investment laws. However, it could be more efficient to be applied. It will have multiple chilling effects on the treaty provisions, irrespective of their relative importance and values. Therefore, the chilling effects of the waiver are not just limited to the default rules but may extend to the mandatory provisions of the investment treaty. This spillover of the chilling effects on the mandatory provisions of investment treaties can derail the efficiency of investment protection norms. We need an efficient contractual arrangement where the effects of the waiver can be limited to the default provisions of the investment treaty, and mandatory provisions remain intact from the waiver effects.

4. CONCLUSION

The authors have attempted to examine the two research questions in this paper critically. The authors answered them as follows –

"R.Q. 1" - Whether Reflexive losses claims by the shareholders against the actions of the host state are enforceable under investor-state investment disputes?

The concept of reflexive loss claims by the shareholders of the investor corporations needs to be revised if enforced under the investment treaty. Primarily the losses are incurred by the corporation, which is a separate entity from its shareholders or members. Thus if the reflexive loss claims are enforced, it will break the established rule of corporate laws that the company is a separate entity from its members. Also, the enforceability of reflexive losses will lead to a situation where the host state compensates the company and its shareholders for the exact cause of action. This can lead to severe financial implications for the host state. Also, the practice of tribunals allowing claims for reflexive losses has a detrimental impact on corporate laws and governance procedures inside the domestic realm of states. This is also producing problems, such as the simultaneous filing of claims for the same loss by the shareholders and the firm in two separate arbitrations, which weakens the company's position and limits its ability to bring the issue up with the host state.

Thus currently, there is a situation of legal uncertainty over the enforceability of reflexive loss claims.

"R.Q. 2" – Is the private ordering solution feasible for preventing the shareholder from raising the Reflexive losses claims?

The solution suggested by V. Korzun is a legally valid proposition in the context of international investment laws, but it could be more efficient to be applied. It will have *multiple chilling effects* on the treaty provisions, irrespective of their relative importance and values. Therefore, the chilling effects of the waiver are not just limited to the default rules, but they may extend to the mandatory provisions of the investment treaty. This spillover of the chilling effects on the mandatory provisions of investment treaties can derail the efficiency of investment protection norms.

The authors suggest that the application of private ordering solutions should be restricted to the default provisions of the international investment treaty. The investor corporation can incorporate a "Limited Application" approach, where it can enlist the specific treaty provisions, which will be subject to the application of the private ordering solution. For incorporating the limited application approach, the relative importance of provisions of an international investment treaty is to be studied. Accordingly, the investor company has to decide which provisions shareholders will not take recourse to in case of reflexive loss.

The authors further suggest that the provision relating to dispute settlement must be included in the private ordering arrangement. It implies that the shareholders will be able to raise disputes against the host state if they incur reflexive losses.

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