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Taking Risks In Structuring A Foreign Investment: A Golden Opportunity At All Costs?

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Investing internationally is all about taking risks. Risk-taking is essential to survive in today's business world, where competitors, rivals, challengers, in all sectors of the economy, are growing like mushrooms. One needs to take risks to stand out from the rest.

Foreign investors are at the center of our economies and appear as key actors in today's business world: they play a crucial role in fostering a State's economic development. Doing business in a foreign territory already constitutes risk-taking by itself, because it activates a myriad of national laws, regulations, and domestic statutes applicable to the foreign investor's business which are often protective of the host State's own national interests and not always favorable to foreign entities. For example, a Danish company willing to invest in Egypt and set up a business venture in the tourism sector of this country will be faced with numerous statutes already in place governing this sector, that seek to preserve the Egyptian state's sovereign powers, including to regulate in the public interest. It is therefore important for foreign investors to analyze the legal framework already in place before deciding to invest in another country. Moreover, the Danish investor could be requested to comply with new resolutions adopted by the State or its organs, introducing new obligations or abolishing a previous regime, which it did not necessarily contemplate when making its investment.

Taking risks, yes, but at what cost? Isn't there a way to put the foreign actor in a more secure position by curtailing those risks? In other words, why would a foreign national or owner of a foreign entity take the substantial risk of investing overseas, sometimes in an underdeveloped country, that is in urgent need of a boost in its productivity, growth in its economy, and well-known for its rigid, pro-government laws and regulations unfriendly to foreign investors, unless those risks can be controlled?

Controlling risks is not only in the interest of investors; it is also in the interest of host States. Let's face the reality: host States are, in the first place, concerned with the safeguard of their own national interests. It is true that recent developments in the international investment law field have proved that protection of the principle of national sovereignty and of States' rights to regulate and legislate are governments' priority when doing business with foreign entities. *Nevertheless, host States need* *foreign investors*. They call for investments to contribute to and foster their economic development, to boost their productivity, to help them become more attractive – ultimately, to increase their hope that one day, they will become a "developed country" called and recognized as such. This is why host States enter into Bilateral Investment Treaties: the goal of these instruments is to encourage the inflow and retention of investment.

This reality reveals a crucial element: faced with this pressing need for foreign investments, host States are ready to make "sacrifices" to attract this much-needed financing in various sectors of their economy. The key is for investors to take more advantage of this situation. Investors should act wisely: they are desired, they are wanted, they are needed. As such, they should consider obtaining and securing in writing with more certainty the conditions on which they are willing to invest.

More specifically, instead of being careless and imprudent, sometimes, in their risk-taking by placing their money in an unstable, unpredictable, and politically sensitive investment climate without taking necessary precautions, foreign investors should insist on being granted more precise incentives and privileges, secured in better drafted and exhaustive agreements. This is a way to ensure that investors will not regret their initial decision to invest in a country. This can be achieved by being more assertive when negotiating with the government of that country. The foreign entity could, *inter alia*, request that the host State sign an agreement awarding specific incentives and privileges to the investor, applicable only to that investor, binding on the State and thus engaging its responsibility if it refuses to honor its obligations set forth in that agreement. While this type of investment agreement is already being concluded by host States and prospective investors, the reality is that the problem persists. Indeed, as we speak there is still a myriad of claims introduced by foreign business ventures seeking compensation for their losses stemming from a host State's violation of the specific assurances, particular incentives, stabilization clauses, and other favorable treatment. This means that investment agreements are not being well drafted and that governments are not accurately capturing investors' expectations at the time of the negotiations. This results in disputes around whether protections alleged by investors really existed or were the basis for the investment.

The key is to go beyond simply drafting an exhaustive investment agreement. *A foreign investor must make it crystal clear to the host country that the assurances given to it are fundamental to its decision to invest in that territory*: it is a condition precedent upon which the investor based its decision to invest in that country in the first place. Its importance must be apparent and obvious on the face of the investment agreement, which should make clear that the talks and negotiations between the investor and the government officials of the State in which it contemplates investing would have never advanced were it not for the assurances given. Investors should not simply let the other party know of the protections that they expect—informing is not enough—rather, they must formalize these protections in writing as fundamental to, and conditions precedent to, making the investment. For example, our Danish investor should insist on an express provision in its investment agreement with Egypt that a tax incentive granted to it by the Egyptian government, such as a reduction in the taxes charged on its hotel complexes, is vital to its investment and gives its decision to invest all its meaning and significance.

Investment treaty claims arise from a foreign investor's discontent with a host State's illegal conduct which had an adverse impact on its investment. Based on a treaty breach allegation, the foreign investor initiates arbitration proceedings positing that its rights under the treaty were violated by the State. Investors' complaints refer to a wide variety of principles: violation of the fair and equitable treatment standard under the treaty, the principle of full protection and security, the principle of national treatment, or illegal expropriation of their business and assets, among others. All these rights are at the center of international investment law and are bedrock principles in this field. Nevertheless, where these protections are not recorded in an investment agreement, uncertainty can arise as to whether they have been infringed. An inevitable question arises: why not seek to protect these precious concepts even more in the foreign investor's investment agreement with the host State or in the treaty itself? One obvious response or critique to this question might be that host States, while recognizing the need to offer an attractive environment for foreign investment and to respect those fundamental principles, are not fools and would not easily give up the protections to their own national interests that they have been so concerned to safeguard. Investors, therefore, should seek to obtain this more solid protection, while making it clear to the host State that its sovereign powers will neither be disregarded nor infringed.

Investors would do well to minimize the risks associated with their investments and thereby to maximize their future gains and returns. After all, foreign investment is a necessity that has genuine positive consequences for the various stakeholders involved, and all are eager to obtain something beneficial out of it. Indeed, while enabling host States to develop various sectors of their economy and attract more business activity, create jobs, and contribute to the building of the country, foreign investment is also profitable to investors seeking to grow by developing their business activity abroad, to gain recognition in other countries, and to start building their name and reputation at a transnational level.

To put it in a nutshell, when negotiating to establish the specific conditions of their investment with the host State's government representatives, foreign investors might want to bat their big blue eyes, in a way to say: "This is what I want and need to secure before I agree to come over; this is what you must assure me if you want this deal to materialize. These are my conditions. Take it or leave it." Go further; be demanding and sassy, as a leader of the game should be. Run the show, while respecting the other party's rights. This is something all investors should master.

Profile Navigator and Relationship Indicator

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