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Contentious Issues of Investment Arbitration: Arbitral Tribunal (Arbitrator) and Transparency, and Expropriation Related to the Influence of Investors on Public Policy

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This article deals with the contentious topic of Investment Arbitration. The author especially focuses on the problems of arbitral tribunal (arbitrator) and transparency, and expropriation related to the influence of investors on public policy. This article discusses the key structure of the arbitration process in the parties and arbitral tribunal. Primarily, we must understand the problems of the arbitral tribunal (arbitrator). The second topic of this article, 'expropriation and compensation' ways to protect investors is explored. It is needed to understand that it is indeed fair and reasonable.

Key words: *International Arbitration, UNCITRAL, ICSID, ISDS, Arbitration tribunal, Arbitrator, Transparency, Expropriation, Public policy, North American Free Trade Agreement.*

Introduction

The core structure of the arbitration process involves the parties and the arbitral tribunal. Among them shall be considered, related to the arbitration process and the qualification of the arbitrator as a member of the arbitral tribunal.

In case of an investment arbitration relating to the agreement, the qualification of the arbitrator is insufficient to adjudicate cases of a public nature. That is, although that is the arbitration related to public policy, there is no requirement for an arbitrator to be qualified to resolve cases in this area. Article 14 of the International Center for the Settlement of Investment Disputes (ICSID) Convention says only that the arbitrator "must have high moral standards, sufficient competence in the field of law, commerce, economics or finance in order to be able to make independent decisions". Does the arbitrator with commercial knowledge have sufficient competence to resolve this dispute if the controversial issue of the arbitration is that the investor has come under the influence of the national policy? This question should be carefully viewed.

The decision and arbitration proceeding the arbitration tribunal shall be established after all participating Arbitrators have expressed their opinion and come to a unified decision. In case of the presence of several arbitrators (usually 3 people), usually the arbitration award is made in the opinion of the majority. Article 48 of the ICSID Convention states that "arbitration resolution requires a majority vote", article 33(1) of the United Nations Commission on International Trade Law (UNCITRAL) Rules says the same. Consequently, when forming an arbitration tribunal, when each of the parties represents one arbitrator, it is immediately clear that differences of opinion cannot be avoided. In addition, there are cases when arbitrators refuse to continue proceeding in the middle of the process.

One of the examples: an arbitrator has tendered resignation during a process due to a difference of opinions has become (Abaclat and Others v. Argentine Republic) case, opened on September 14, 2006 under the ICSID Convention based on the Argentina-Italy Bilateral Investment Treaty (BIT). In this case, there has been no clauses in the ICSID Convention or the ICSID Arbitration Rules on whether the arbitration tribunal could authorise a collective arbitration process, however, because the prohibition on the basis of only the absence of such a clause did not meet the purpose of the ICSID Convention and the Argentina - Italy BIT, most arbitrators favoured a collective arbitration process. However, the Egyptian arbitrator George Abi-Saab, who has been nominated by the respondent Government of Argentina, expressed a protest opinion on the decision and stated that the arbitration tribunal did not have the competence to rule on the case. The arbitrator explained that the reason is that there is no reason to give permission for collective arbitration on the basis of the arbitration process under the Argentine bilateral agreement, due to the lack of a clear clause on this issue, the

arbitration tribunal goes beyond its competence, giving permission for collective arbitration, in addition, such a decision violates laws of procedures, or the right to protest in the individual case of the respondent state; remaining in the minority, the arbitrator eventually resigned during the trial.

This is the case when more than two investors (claimants) filed an application for arbitration on a specific action by the state attracting the investment, or when investments were made in one business that were divided into shareholdings, therefore, the parties having different relations to this, submit an application for arbitration. In the case of several claimants for arbitration (more than two), the arbitration tribunal decides on the right to be a party to the arbitration and on whether the definition of 'investment' for each investor is met, the statement of the investor, whose right will not be confirmed, is usually refused. Thus, sometimes only a part of the claimants gets the right to be a party to the arbitration and the process continues, while the rest, whose right has not been confirmed, are denied arbitration. Regardless of the decision of the arbitration tribunal with several claimants, part of the proceeding cancels their application. Then, if the opposite side, the respondent state, gives consent to the plaintiff to refuse the application, then there is no problem, but if the respondent state does not give consent, this is the arbitration tribunal which shall solve the dispute. Article 44 of the ICSID Arbitration Rules determines the termination of the arbitration process at the party's unilateral request. According to this article, it is possible to stop the arbitration process only after the consent of the opposing Party. In addition, article 36 of the 2010 UNCITRAL Arbitration Rules determines that the arbitral tribunal has the competence to stop the process by asking the parties if it is not necessary or possible to continue the process.

There is a need to address the issue of transparency related to the process and the proceeding of the arbitration. The process and the proceeding of the arbitration is decided primarily in accordance with the opinion of the parties to the dispute. The arbitration process begins by agreement of the parties, and this includes the selection of arbitrators by agreement. Therefore, the arbitration process is carried out in secret to protect the private information of the parties or prevent the leakage of corporate secrets. In other words, we can say that this is a lack of transparency in the process. If an investor sues for policy decisions or for the results of the national decisions already implemented by the state, they can predict the losses from stopping the policy and trust in this policy. If we say that this is an important incident from the point of view of the state or citizens, then the problem that the process is conducted in a closed form with a lack of transparency becomes much more significant. Many measures have been taken to increase transparency in view of such problems, but discussions are ongoing to this day. In this case, there is a lot of discussion about the participation of third parties, or amicus curiae. This function has been strengthened by adding clauses to authorise the written application of non-disputing parties to the rule 37(2) of the ICSID Arbitration

Rules accepted in April 2006, and additional transparency clauses through the 2013 amendments to the UNCITRAL Arbitration Rules. Articles 4 and 5 of the UNCITRAL Transparency Rules contain clauses on the participation of third parties in the arbitration process. Article 17(5) of UNCITRAL 2010 states that the arbitration tribunal has the competence to allow third parties to participate in the process, and it is written that "each party is given the opportunity to rationally express its opinion" in article 15(1) of UNCITRAL 2006, however, there are no established rules in case of the Parties` claims, and the ambiguity of the claims is much controversial. The established rules contain clauses on the participation of non-disputing parties in the process, but it can be said that the consent of the parties plays an important role.

One example is the case of (LSF-KEB Holdings SCA and Others v. Republic of Korea), generated on December 20, 2012 under the ICSID Arbitration Rules on the basis of "(the Korea-Belgium and Luxembourg BIT)" and which is currently in the process. On May 7, June 2 and November 16, 2015, the Korea' NGO (Non-governmental organisation) "Minbyun" filed an application to participate in hearings on the basis of civil right to information and article 37 of the ICSID Arbitration Rules on third parties participating in the process, however, due to disagreement of the parties, it was refused participation (LSF-KEB Holdings SCA and others v. Republic of Korea). Not only in accordance with Article 37(2) of the ICSID Arbitration Rules, but also in accordance with Article 32(2) of the ICSID Arbitration Rules, if at least one of the parties does not protest, except for the obligatory participants in the process referred to in Article 32 (1) of the rules, other parties may participate, in addition, article 17 (3)(5) of the UNCITRAL Arbitration Rules stipulates the participation of third parties in the proceeding. However, the final decision on this matter belongs to the arbitration tribunal.

It is difficult to maintain the basic principle of the arbitration proceeding regarding principle non-disclosure at the same time while considering transparency to satisfy the right to know of the people and NGO of the respondent state. Especially, it is necessary to manage the process well so that non-disputing parties cannot abuse their position despite the fact that the participation of third parties is allowed in the arbitration proceeding. In addition, "what is included in their real intentions, whose benefit they protect, how to blame them for their actions" are important issues in this matter. So, in each case, a serious decision must be taken about the extent to which third parties can be allowed to participate in the process. It is clear that the transparency of the arbitration process has systematically improved through the Arbitration Rules and the UNCITRAL Convention and the amendments to the ICSID Arbitration Rules. However, the important thing is the need for clear instructions to the arbitration rules and the establishment of an official standard for third parties to participate in arbitration. This issue still causes a lot of controversy. Consequently discussions and attention to this issue are required.

As mentioned above, through amendments to the rules, the participation of third parties in the arbitration process received official status, but at the same time caused a violation of the basic principles of arbitration, such as speed, low cost and confidentiality, which are the main reason for applying to this procedure, in particular, pressure from third parties causes a delay in the process, an increase in the cost of the process, as well as the participation of third parties can potentially cause political problems, that cannot but worry the participants.

Expropriation related to the influence of investors on public policy

In recent investment agreements, the grounds for the invasion of foreign investors in public policy have intensified and become more specific. Such provisions are "National treatment" and "Most favoured nation treatment", for example, "Minimum Standard of Treatment", "Principle of non-discrimination treatment"[1]. These provisions are at the same time protective instruments to preserve foreign investors and also a reason for them to intervene in the domestic policy of the state. Typically, investor protection related to public policy is done through "expropriation and compensation". Such compensation and expropriation provisions are designed to protect investors (especially foreign investors). Previously, expropriation was in the usual 'direct' form of nationalisation or property confiscation (investment) of a foreign investor, but recently, expropriation in the 'indirect' form has become widespread. This formally recognises the investor's property rights but makes the investment activity more difficult, or deprives the meaning of investment, which, is the result that leads to real direct expropriation. There is a growing tendency to appeal to arbitration (or court) in connection with such results. In the field of public policy, negative changes are appearing due to the need of the state to change the promotion of the policy in order to avoid arbitration proceedings with investors in areas related to public interests or national welfare, which should be carried out by the state. Thus, it is expected that this phenomenon will increase, as the number of cases where international companies (private or public) participating in the public policy of the state attracting investments is growing.

Now public policy cases shall be defined. To begin with, the cases in which the investor has won shall be considered. Case of Ethyl Corporation v. The Government of Canada was opened on September 10, 1996 under the UNCITRAL Arbitration Rules (1976) based on the North American Free Trade Agreement (NAFTA).

Ethyl Corporation is a chemical company based in Virginia, USA that manufactures additives such as Methylcyclopentadienyl Manganese Tricarbonyl (MMT), to improve automobile engine functions. Ethyl's products were exported to Canada through the Ethyl Company, however, in 1997, the Canadian government decided to stop Ethyl's MMT from being traded

[1] Principle of non-discrimination treatment.

and shipped to Canada. This was on the basis of the 1997 'ban on the production of MMT' under the US Federal Environmental Protection Act. The Ethyl Corporation therefore filed an arbitration claim to violate three clauses of NAFTA: Section 1110 on expropriation and compensation, Section 1112 on the National Treatment for authorising other Canadian companies to manufacture MMT and the ban on the import of American goods, Section 1116 on the Performance requirements (Notice of Intent to Submit a Claim to Arbitration of Case Ethyl Corporation). On the other hand, the Canadian government claimed that these were measures to strengthen the standards for the elimination of harmful chemicals and air pollution, these measures were taken as a result of a survey of motorists that this product could damage the catalytic converter due to smoke emissions when used MMT, in addition, the reason for the ban on the production of MMT at the Federal Environmental Protection Agency was the concern that the manganese that is part of MMT would harm humans. The reason that the Canadian government has been guided, no doubt, lies in the implementation of public policy, the priority of which is to protect the environment and the health of citizens, regardless of state.

Before starting the main hearings, the Canadian government requested a rejection of this case, as Ethyl Corporation violated the procedural rules by not protesting the Canadian government, and immediately made a claim against NAFTA despite 6 months of delay after the import ban was issued, as well as The law relating to MMT was not the law that had been implied by NAFTA. However, the NAFTA Commission did not accept the objections of the Canadian government and immediately proceeded to the main hearings on June 24, 1998. However, the Canadian government, being anxious about the arbitration hearing, expressed a desire to close the proceeding ahead of schedule, and finally, on July 24, 1998, in the form of an "out-of-court agreement", the Canadian government immediately cancelled the suspension of MMT imports and paid Ethyl Corporation compensation in the amount of 13 thousand dollars. In fact, the Canadian government lost in this case.

The case described above is a controversy with regards to the surrounding indirect expropriation related to environmental policy. Ethyl Corporation, among the reasons for filing an application for arbitration, indicated a "provision on expropriation and compensation." This case has the following three meanings. First, "government environmental policy may change under investor pressure." Secondly, "state's regulatory rights and precautionary principles have been suspended. "Thirdly, an example has appeared in history when "the issue of indirect or direct expropriation of a foreign investor is put in priority over government regulation" (Award on Jurisdiction of Case Ethyl Corporation).

Now to consider the case related to public policy, where the state has won (the investor has lost). Case of (Telenor Mobile Communications A.S. vs. The Republic of Hungary) was opened on December 16, 2003 under the ICSID Arbitration Rules on the basis of the

"Hungary-Norway BIT". This case was opened on the basis of a concession agreement concluded between Pannon, a subsidiary company of Telenor Mobile Communications, as well as the plaintiff in the case, and the Ministry of Transport and Communications of the respondent state. The plaintiff is a Norwegian company, Pannon is a subsidiary based on the territory as the respondent state, and 75% of the shares are owned by the Norwegian government. At the time of signing the concession agreement in Hungary, the respondent state, there was only one wireline provider, and according to the concession agreement, Pannon paid various fees. Subsequently, the government of the respondent state as a member of the European Union (EU) and the rules for the provision of universal service of the European Community (EC) made it necessary to provide a universal service, therefore the government of the respondent state refused the services of Pannon, a mobile telecommunication provider, and entrusted the provision of these services only to a wired communication provider. Thus, the plaintiff stated that due to such measures, Pannon's market share was abridged, and the company's income was selected through dishonest use of the network in favour of a competitor. Thus, such measures by the respondent state violated the obligation to comply with the provisions on the prohibition of indirect expropriation under the "Hungary-Norway BIT", and became the reason for filing an application for arbitration by the plaintiff. The arbitration tribunal made the following award to the arbitration put forward for this reason. First, it should be noted that the mere exercise of control rights by the state, which has a negative impact on investment, is not classified as expropriation. In other words, if the degree of pressure on investment seriously affects the real economic value and usefulness of the investment, then this refers to expropriation, and this was verified by examples of other arbitral decisions.

In Tecmed vs. The Mexico case, the arbitration tribunal ruled that "because of certain government measures, the investor has been deprived of economic value, utility and ownership of the investment, so this case should be considered as expropriation of capital." There is no need to take into account the purpose or intention of the government that took such measures. However, it said that between the exercise of the state's legitimate regulatory power and the expropriation should be distinguished. As well, case arbitration Tribunal of Metalclad vs. The Mexican stated that "the expropriation of NAFTA includes not only the deprivation of clear and formal ownership or deprivation the deliberate and open takings of property as before, but government's accidental interferences that led to the deprivation of real, reasonable and expected return on investment capital. The arbitration tribunal ruled that the measures taken by the respondent state in connection with the service policy over a wide area that caused the problem did not differ much from the situation of other states in Europe, measures that excluded telecommunication service providers from the provision of a universal service were equally applied not only to Pannon, but also to other wireless providers. In addition, the levies (shares in expense) raised by the applicant for unfairness were not only imposed on Pannon, but it was equally applicable to all wireline and wireless

communication providers.[2] In connection with this situation, the arbitration tribunal ruled that it is difficult to judge that the "measures by the Hungarian government", which the plaintiff opposed, actually deprived the economic value of the investment so much that it could be determined by expropriation, and in addition to a certain amount, which was forced to pay Pannon, there was no reason to believe that the capital of Pannon was confiscated. In addition, the arbitration tribunal ruled that Pannon was managed independently by the board of directors without intervention from the government, and the concession agreement was in force. Thus, the arbitration tribunal ruled that the fact of the expropriation of the plaintiff's property had not been proven, and the arbitration initiated because of the violation of the prohibition of indirect expropriation was rejected (Ministry of Justice of Republic of Korea, 2014).

Conclusion

Many arbitration experts say that the outcome of the arbitration depends on the arbitration tribunal(s). In addition, a situation that requires specific actions regarding the transparency of the arbitration process and the qualification of the arbitral tribunal (arbitrator) still continues. Naturally, the arbitration tribunal can take into account past examples and other principles, the agreement that is the basis of investment arbitration, and the powers received from the parties by agreement. However, in quite a lot of arbitration the proceedings are not transparent and are also arbitration awards (decisions) that are hard to accept in common sense. As one of the solutions to pass away from the situations, such as NAFTA "the departments related to the trade of the Contracting States of the Agreement, and if these recommendations and instructions are applied in arbitration as binding" [3], will it not make it in the arbitral award and transparency in the process more confident, moreover, in the case of recent rapidly increasing number of arbitrations related to state public policy, a state that retains investments, it has the duty to protect investors, but investors also should not act only in their own interests, but should also think from the point of view of the state attracting investments, understanding the importance of public interests and politics, therefore, it is necessary to look for a direction in which both sides would have stand to win through cooperation and mutual trust.

[2] In public activity (business), money that is paid as an expense to an activity (business) to a person (company) involved in this activity (business).

[3] NAFTA provides comments and instructions on the provisions of the agreement through the NAFTA Free Trade Commission, which involves departments related to the trade of the Parties to the Convention, and these comments are mainly used in arbitration. NAFTA provides comments and instructions on the provisions of the agreement through the NAFTA Free Trade Commission, which involves departments related to the trade of the Parties to the Convention, and these comments are mainly used in arbitration. URL: https://www.nafta-sec-alena.org/Home/About-the-NAFTA-Secretariat/Overview; https://www.nafta-sec-alena.org/Home/About-the-NAFTA-Secretariat/Mandate.

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