PROCEDURAL ASPECTS OF THE INTERNATIONAL INVESTMENT ARBITRATION

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ABSTRACT

Procedural aspects of international investment arbitration presented in the paper aim to higlight some particularities of this type of arbitration mirroring *sui generis* nature of investment based relations. As a result, two methods were imposed as applicable: dogmatic method and analysis. The dogmatic theory explains legal approach applicable in the arbitration investment practice through existing legal norms, formal sources and procedural aspects of investment law. The analysis describes the elements of the investment arbitration procedure, while trying to explain the complexity of this type of procedure based on its elements. International investment agreements in addition to the substantial standards of investment protection enable the initiation of arbitration proceedings against the host country in which the investment is made aiming to resolve disputes that may arise regarding the scope of the performance of obligations contained in a investment agreement and the compliance of the performance with the specified substantial standards. Thus, the responsibility of the host country in international obligations is established without the need for the intervention of the home country.

Keywords: *investments, arbitration, procedure, ICSID, arbitration clause*

INTRODUCTION

Protection of direct foreign investments mainly refers to compensating for harmful actions of governments or other state bodies or agencies of the host country that affect investments, but also for illegal or harmful actions of third parties when protection of the host country is foreseen and necessary. Every aspect of direct foreign investments legal protection is accompanied by the problem of unequal status of the subjects of the investment based legal relations (the state as sovereign and the investor-natural or legal person). In this sense various legal forms for the protection of foreign investments are foreseen: prohibition of expropriation of foreign investments with certain legal restrictions and when fair compensation is provided, arbitration in international investment disputes stipulated in multilateral or bilateral investment agreements, national investment regulations and in investment contracts parties (including litigation before national courts, alternatively or as a precondition for arbitration), executive

procedures accompanying arbitration or litigation proceedings before national courts, diplomatic protection of investors[1].

Conditions for initiating investment arbitration

Conditio sine qua non in this sense is the consent of the host country which can be contained in aninternational, bilateral or multilateral investment agreement. Somewhat less often, this condition may be contained in investment agreements concluded directly between the host country and the investor or be found within the national legislation of the host country.

UNCTAD (United Nations Conference on Trade and Development) has a whole range of instruments that facilitate the interpretation of the above condition in terms of the state's consent to the initiation of arbitration proceedings and which as such are useful and should be consulted in the event of a dispute [2].

However, in this context, certain disputed issues have been recognized in terms of the determination (interpretation) of active legitimacy for the initiation of arbitration proceedings in the event it is not initiated by the state. One of those questions is incorporated into the structure of the definition of an investor. And while the definition of the term investor is mostly based on the investor's citizenship, the relevant citizenship in terms of identification for initiating arbitration proceedings is the citizenship of the investor, a natural person who can initiate proceedings on behalf of a company established in the host country or on his own behalf. The concept of investor, which is most often contained in bilateral or multilateral investment agreements, has a wide range, so that the size of the share, the number of shares or the percentage of participation in the capital of the company do not play an important role from the aspect of the investor's active identification. This is because their shares or participation do not represent the degree of control over the company, but, on the contrary, constitute an investment [3].

The situation is different in the event that the initiation of the procedure is done by a business entity that is under foreign control when the question of its active identification as a foreign investor arises. This is of particular importance, e.g. in a situation where the request to initiate the procedure is submitted by a locally incorporated branch of a business entity with headquarters in the country of origin of the investment. According to the traditional rules of diplomatic protection, such a subsidiary would not be able to obtain the protection of the country of origin of the investment. But under the rules of international investment law, such a potential obstacle can be overcome. Thus, according to the provisions of Article 25(2)(b) of the ICSID Convention, a locally incorporated subsidiary may have the status of a foreign investor if the parties to the dispute have agreed that such a subsidiary is under foreign control, or de facto under foreign control.

In connection with the aforementioned, and when there is no doubt regarding the active identification of the investor, a problem may arise in the event that such, conditionally speaking, extended active identification causes the initiation of several arbitration proceedings on the same factual and legal basis. Further consequences can then be reflected in different arbitration decisions and multiple costs for host countries (which is especially challenging for developing countries). Some of the solutions proposed by UNCTAD are the consolidation (merging) of procedures or the inclusion in international investment agreements of a clause that would oblige the tribunal to treat the matter in question as a decided matter, under the stated circumstances [3].

Substantively, international investment agreements impose certain obligations on the state in which the investment is made in terms of providing protection to the investor and investments, but on the other hand, they do not clearly define whether the correlative rights belong to the investor, the state in which the investment is made, or are reserved for both subjects. Procedurally, international investment agreements usually contain two types of dispute resolution clauses: one that refers to disputes between the investor and the state in which the investment is made, and the other that applies to disputes between the signatory states of the agreement, and relates to the interpretation and application of the provisions of the agreement. However, most agreements do not regulate the interaction between these two forms of dispute resolution [4].

Thus, three approaches to the nature of investment rights can be clearly distinguished, but not to their goal and scope:

1. Investment agreements provide material and procedural rights only to the subjects of those agreements, and investors derive their material rights from the material law of the home state;

2. Material rights are reserved exclusively for the signatory states of the agreement, and investors have procedural rights for the purpose of implementing the material rights of the state;

3. Investment agreements directly provide investors with material and procedural rights

For the purpose of analyzing the scope and goal of investment rights, it is therefore necessary to approach the investment legal relationship as a tripartite relationship between sovereign states that provide enforceable rights for investors as beneficiaries of those rights [4].

In investment arbitration practice, the starting point for the interpretation of international investment agreements is the Vienna Convention on the Law of Contracts. The provision of Article 31 of the Convention prescribes that agreements are interpreted in good faith and in accordance with the usual meaning

of the terms contained in the agreement, and in the context of the agreement and in accordance with its aim and purpose. Furthermore, the provision of Article 32 of the Convention stipulates that the context of the agreement, among other things, should include the text of the agreement, preamble, annexes and other supporting documents [5].

Usually, the aim and purpose of investment agreements are proclaimed in their preamble as the promotion and reciprocal protection of investments. Considering their wording, prima facie one could create the perception that the interpretation of such general goals can be in favor of investors. Notwithstanding this, most arbitral tribunals choose to follow a balanced approach to the interpretation of investment treaties. A more extensive approach is characteristic in situations where the goal and purpose of an investment agreement are proclaimed to be "the creation and maintenance of desirable conditions for investments by the contracting state in which the investment is made." Given that the intention of the states is to create a broad framework for attracting investments that will provide legal certainty, it could not then be argued that this broader approach to interpretation is more favorable for investors, because tribunals only interpret the provisions of the agreement in relation to the express intention of the states at the time of the conclusion of the agreement [6].

The range of manifestation of consent to arbitration settlement of disputes ranges from simple recommendations to subjects of investment-law relations to use arbitration as a way of settlement of disputes to unambiguous authorization of the investor to initiate proceedings before ICSID tribunals. In the first case, it is, we would say, a kind of optional obligation of subjects to choose arbitration. In the second case, the investor is given the opportunity to participate directly in the proceedings against the host state through a neutral forum, which depoliticizes the process itself because it excludes the participation of the investor state [7].

Most of the provisions of bilateral agreements related to the settlement of investment disputes refer to the mechanisms provided by the ICSID Convention and aim to establish jurisdiction in this type of dispute by the tribunal within the ICSID Center. However, in the interpretation of these provisions, it is necessary to carefully approach the range of the intention of the parties to the agreement to establish such jurisdiction in a specific case.

Manifestations of consent to arbitration of disputes

Arbitration clauses contained in investment contracts are a traditional form of manifestation of consent to arbitration of disputes. Theoretically, arbitration clauses can be contracted ex post, although in practice they are contracted at the moment of conclusion of investment contracts. Whether arbitration clauses will be concluded, as well as the conditions under which they will be binding, depends on the balance of power or the negotiating power of the host country and the foreign investor [8].

National legislation is another form of manifestation of consent to arbitration, which prescribes the types of capital that can be invested, the sectors that are open and not open to investment, and other conditions relevant to foreign investment. However, national regulations do not have to contain provisions that explicitly prescribe the state's consent to arbitration, but can only be about the recognition of an arbitration forum for the resolution of disputes of this type, thus reducing the importance of national regulations in terms of the manifestation of consent to arbitration [8].

Procedural aspects of investment arbitration under the ICSID Convention

The jurisdiction of the ICSID Center is prescribed by Article 25 of the ICSID Convention, according to which the jurisdiction of the Center will extend to any legal dispute arising directly from an investment between the contracting states (or some political-territorial unit or agency within the contracting state that the state has designated as a legitimate party in dispute) and the investor if there is a written consent of the contracting states to resolve the dispute before the Center.

What could have caused some doubts was the lexical construction of the provision of paragraph 1 of Article 25. Namely, according to its interpretation, it follows that the competence of the Center can be based only if it is a legal dispute and if that legal dispute arises directly from the investment. The manner in which the tribunals applied this provision gradually evolved and became the subject of numerous debates, of which the Salini case is certainly the most significant. Before the mentioned case, the tribunals either did not interpret the concept of investment at all or interpreted it according to specific bilateral agreements concluded between states. The meaning of the term investment was sought by tribunals in two cases: Fedax N.V. c. The Republic of Venezuela, (ICSID Case No. ARB/96/3) and CSOB. c. Slovakia Ceskoslovenska Obchodni Banka, a.s. c. The Slovak Republic (ICSID Case No. ARB/97/4) but it was insufficiently detailed considering their position that the concept of investment contained in Article 25 of the Convention should be given a broad understanding.

The Decision in the case of Salini Costrutorri S.P.A and ITALSTRADE S.P.A v. Kingdom of Morroco (Decision on juristdiction, July 23, 2001) was significant for two reasons. The first is that the tribunal in the specific case took the position that the existence of the investment is an objective condition for establishing the competence of the Center [9]. The second is that the conditions for the existence of investment according to bilateral agreements and according to Article 25 of the Convention are clearly separated, whereby the examination of the existence of the conditions according to the BIT had to precede the examination of the conditions according to Article 25.

In this context, it is also important to mention that the consent to the arbitration procedure before the Center excludes the use of other forums and administrative or judicial remedies (unless the contracting state requires the

exhaustion of national legal mechanisms), in which way the aspect of mutuality of consent is reinforced and emphasized when determining the jurisdiction of the Center (Article 26 of the Convention).

The arbitration process is initiated by a request, where the contracting state and the investor have party identification. The request is registered by the General Secretary, except in the case when it is evident that the subject of the procedure is not within the competence of the Center. After registration, the Arbitration Council or Tribunal is constituted in accordance with the agreement of the parties. In the absence of an agreement, the Tribunal consists of three arbitrators (one proposed by each of the parties) and the President of the Tribunal, who is determined by mutual agreement of both parties. When the parties cannot agree on the appointment of arbitrators, the chairman of the Administrative Council may appoint arbitrators after consulting the parties [10]. (Articles 36-38).

The arbitration procedure itself is conducted in accordance with the provisions of the Convention and the Arbitration Rules, except when the parties exclude the application of the Rules. Otherwise, the Arbitration Rules regulate the cross-examination of witnesses, evidence and the language of the proceedings (ICSID Rules 35(1) and 33-34) [10]. The parties are also free to choose the substantive law that the Tribunal will be obliged to apply in the specific case [10]. (Article 42, Paragraph 1). According to the Convention, the application of the national law of the host country is allowed if the parties have not agreed on the application of substantive law, provided that the national law of the host country is in accordance with the applicable international law.

The application of the rules of the arbitration procedure contained in the Convention and the application of the Arbitration Rules (under the specified conditions) is mandatory until the decision is made by the tribunal. The decision is binding for the parties and recognized before the courts of all contracting states. It has the legal effect of a final judgment (Article 53, paragraph 1 and Article 54, paragraph 1) [10]. Enforcement is carried out according to the law of the country on whose territory enforcement is requested (Article 54, Paragraph 3) [10].

The execution of arbitration decisions in the context of investment disputes is accompanied by certain problems, which again opens up space for a more detailed investigation, so for the purposes of this paper, we will remain on what is formally and legally provided for by the ICSID Convention.

CONCLUSION

The structure of the investment-legal relation is complex. The usual components of the structure are the subjects of such a legal relation, the object and the duration of the investment-legal relation. If we were to represent the structure through variables, we clearly notice that each of those variables/components of the structure is changeable, with the degree of

changeability being determined by a greater or lesser degree of predictability. For example, the variable duration of the investment relationship is a variable variable with a high degree of predictability, while the state variable (as the subject of the investment relationship or more precisely the activities and measures of the state) is also a variable variable but with a low degree of predictability.

The components of the structure of the investment relation are highly correlated and this correlation is especially pronounced between it's subjects. At the same time aforementioned correlativity further complicates the structure because it presupposes the inclusion of the investor as a *de facto* autonomous subject of the investment relation. Namely, the subjects of bilateral investment agreements are sovereign states, their fundamental intention is to provide a stable legal environment for investments as objects of investment relations through direct legal protection mechanisms. However, the effectiveness of the general legal mechanisms contained in bilateral agreements will depend on the selective procedural rules made available to the parties. The direct legal link between the state in which the investment is made as the subject of the investment relationship and the investor at the level of bilateral agreements is insufficiently defined. On the one hand, this reffers to bilateral agreements (from the perspective of investors) as some kind of adhesion agreements. On the other hand, investments are executed in stages, taking the legal form of contracts or concessions. That is why it was necessary for legal theory and practice to recognize some clearer legal connections between the aforementioned subjects.

The complexity of the relationship structure in question is also visible in the fact that international investment agreements undeniably provide protection to investors, but only from certain unilateral measures of the state in which the investment is made (expropriation without adequate compensation, discriminatory treatment of investors), and through arbitration in the investor-state relationship. are invested, they guarantee the fulfillment of obligations assumed by the state. What remains unclear is the domain of investor protection in the context of unilateral measures of the investor's state and collective measures of the subjects of the international investment agreement. These agreements do not address the described correlations.

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