



GUARANTEES OF PROTECTION OF FOREIGN INVESTORS FROM EXPROPRIATION AND NATIONALIZATION

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Abstract:

For the economy of our country, investments have always been the subject of constant attention of scientists. Reliable protection and provision of foreign investments are currently in high demand in practice. A clear understanding of investment activity guarantees and a good orientation in the current legislation are becoming the most urgent task for modern researchers. Such a direction as guarantees for investment entities, analysis of international and national legal guarantees, has become relevant at the moment due to the limited scientific research in this area within the Republic of Uzbekistan.

Keywords: foreign direct investments, expropriation, GATT, Uzbekistan, investment climate, international trade, nationalization.

In Article 11 (ii) of the Seoul Convention on the Establishment of MAGI, expropriation refers to any measure of legislative or administrative action or inaction emanating from the host Government, as a result of which the owners of guarantees are deprived of property rights in relation to investments. An exception to this rule is the definition of measures that are considered non-discriminatory.

Article 13 of the ECT dated December 17, 1994 is called "Expropriation". The concept of expropriation is disclosed in paragraph 3 of this article, which states: "... expropriation covers situations when a Contracting Party expropriates the assets of a company or enterprise on its territory in which an investor of any other Contracting Party has investments, including in the form of shares"[1].

The decision of the European Court of Human Rights in the case "Handyside v. United Kingdom" states that expropriation can be considered the actions of the state, as a result of which the investor is unconditionally and completely deprived of his property. In the case when the investor is not deprived of ownership of the property, but the content of this right is significantly diminished, and the situation itself is reversible, the court cannot find a violation of the Convention on the Protection of Human Rights and Fundamental Freedoms (Article 1 of Protocol No. 1). A similar position was also taken by the ICSID arbitration in the case of "Tradex Hellas S.A. v. Republic of Albania»[2].



It can be noted that in international treaties, in some cases the terms "nationalization" and "expropriation" are used as synonyms, and in others they have a generalizing character, since they are used to denote other acts of forced "withdrawal", "alienation" of investments, in other cases they are used as different legal concepts. From this it can be concluded that in international treaty practice, as well as in doctrine, there is no single approach to this issue.

The treaty practice of States proceeds from the fact that relations related to the forced withdrawal of investments, which can be carried out in various forms: nationalization, expropriation, similar forms of withdrawal, etc., are subject to regulation. For all these forms of withdrawal, the same rules are established by international law. At the same time, it can be argued that both the concepts of "nationalization" and "expropriation" are contained in international treaties due to the fact that nationalization is not defined in any way in international law.

It should be noted immediately that the actions of State bodies that represent indirect or creeping nationalization and expropriation are illegal and entail international legal responsibility of the State. However, not all measures of state interference in property rights are indirect nationalization. Foreign property may be subject to taxation, licensing, etc. Such measures, according to I. Brownley, are lawful and are not considered expropriation. In accordance with the point of view of M. Sornoraja, non-discriminatory measures related to consumer protection, securities market regulation, environmental protection are not subject to compensation, as they are considered as necessary measures for the effective functioning of the state [3].

The concept of indirect nationalization and expropriation is formulated differently by experts in the foreign doctrine of international law and in international treaties. I. Brownley, for example, uses the concept of "de facto expropriation" instead of "indirect expropriation".

Article 1110 of the NAFTA agreement does not refer to indirect expropriation, but to measures equivalent to nationalization or expropriation. In Article 13 of the Energy Charter Treaty, instead of the concept of "indirect expropriation", the expression "measures having consequences similar to nationalization or expropriation" is used. Most bits prohibit direct nationalization and expropriation or measures having an equivalent effect. At the same time, investment agreements do not disclose the concept of indirect nationalization and expropriation.

Indirect nationalization and expropriation are recognized in the practice of international arbitration. There are cases in which arbitration courts regarded state regulation measures as indirect nationalization. More complex questions arise when it is necessary to identify signs of indirect nationalization and expropriation.



On the one hand, there is a widespread opinion in judicial and arbitration debates that legitimate government regulation measures are not indirect nationalization and protection against it should not de facto replace investment insurance. This point of view was approved by the Tribunal for the Settlement of Iranian-American Claims, as well as in the NAFTA arbitration in the case "S.D. Myers, Inc. v. Government of Canada"[4].

On the other hand, it is considered that any violation of the investor's rights should be considered as nationalization or expropriation. This approach has been adopted by the ECHR (European Court of Human Rights), which does not consider that legal measures of state regulation should be completely outside judicial control. The ECHR proceeds from the fact that state regulation measures must comply with the principle of proportionality. The basis for this statement is provided by the distinction established in article 1 of Additional Protocol No. 1 to the European Convention on Human Rights between the deprivation of property and the exercise of control over the use of property.

The main principle that makes it possible to determine the fact of indirect nationalization is that the Government or public authority must exercise its sovereign right. In international judicial practice, this principle was reflected in the Azurix case, where it was established that a violation can be considered a measure equivalent to expropriation if the State violated the terms of the contract by exercising its sovereign power.

Scientists understand creeping expropriation as a slow and gradual encroachment on one or more property rights of a foreign investor. The investor's rights to use the property are reduced as a result of state intervention.

R. Dolzer notes on this issue that "creeping expropriation" implies the presence of an intentional strategy on the part of the state, which can cause a negative moral assessment[5].

The concept of "creeping" expropriation is widely used in arbitration practice. For example, in the Biloune case, the arbitration found that a number of government actions aimed at stopping an investment project by an investor constitute indirect expropriation. The case concerned the investments of a Syrian citizen Biloun in the construction of a hotel complex in Ghana. After performing a significant amount of work, the state authorities suspended the construction permit. According to the arbitration, it is obvious that in the aggregate, the forced suspension of work, the requirement to file a declaration by Mr. Biloun caused the termination of work on the project. The Arbitration decided that such actions constitute a creeping expropriation.



The problem of protecting a foreign investor from indirect nationalization and expropriation is that it is quite difficult to determine the exact boundary between indirect expropriation and legal measures of state regulation, despite the fact that theoretically they are quite well and clearly defined.

The ad hoc arbitration in the Saluka case also noted that "... international law has not yet established certain permissible and generally accepted rules according to which the regulatory actions of public authorities are lawful and are not subject to compensation. In other words, he has yet to define a clear distinction between actions that are not compensable and measures that involve depriving a foreign investor of his investments, thereby illegal and compensable in accordance with international law." [6].

Indirect nationalization can also be considered State interference in contractual relations. An example of such indirect expropriation can be seen in the decision in the case "CME v The Czech Republic", in which the ICSID arbitration found that there was no physical seizure of the investor's property by the state, but the commercial value of the investment was significantly reduced due to the measures taken by the media Council. The court found that the media council forced the investor to change the contract with his business partners.

Indirect expropriation took place in the Eureko case, where the ad hoc court established the fact of indirect expropriation as a result of the violation by the Polish Government of the contractual rights of a foreign investor concerning the privatization of a state insurance company. The Court found that Poland's refusal from the subsequent sale of shares is clearly discriminatory.

In the case of Benvenuti and Bonfant, the ICSID arbitration concluded that the cumulative effect of a series of government measures, the seizure of the investor's premises, amounted to de facto expropriation.

In practice, as an example of direct intervention, the appointment of the heads of the enterprise by the government of the recipient State should be called. For example, the Tribunal for the Settlement of Iranian-American Claims qualified as indirect expropriation the appointment by the government of managers of the enterprise, as a result of whose actions the investor was deprived of ownership of his property acquired for investment [7].

The analyzed international legal material on nationalization (expropriation) allowed us to come to the conclusion that indirect nationalization (expropriation) should be understood as one or a number of actions/omissions (measures) of the state as a result of which the investor loses his investments without turning them into state ownership,



or the investor loses a reasonably expected income from his investments, or his rights to use capital investments are significantly reduced.

Defining a unified approach to the issue of indirect nationalization and expropriation is necessary in order for recipient States to provide clear standards in the interests of private investors, and investors with the necessary guarantees of investment security. The above analysis allowed us to propose a certain list of forms of indirect nationalization and expropriation, confirmed by arbitration practice. Among these forms are:

- excessive or arbitrary increase by the recipient state of tax or other mandatory payments, entailing for a foreign investor the loss of investments or the economic inexpediency of continuing the investment project;
- interference of the regulatory body of the recipient state in the contractual relations of the parties to the investment contract, resulting in a decrease in the commercial value of the investment or termination of the investment contract;
- violation of the rights of a foreign investor as a result of the adoption by the recipient state of discriminatory regulatory measures that resulted in the loss of investments or non-receipt of income that the investor expected when making investments;
- interference of the recipient state in the investment management process by appointing managers of the enterprise, as a result of whose activities the investor is deprived of investments or ownership of property acquired at the expense of investments;
- cancellation or refusal to issue licenses and permits by the recipient state that the investor could legitimately count on, as a result of which the investor's property rights are violated.

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