REVIEW OF DISPUTES ON INVESTMENT PROJECTS WITH FOREIGN PARTICIPATION

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The experience in attracting foreign investments accumulated in Russia objectively gives reason to assess the state of the legal framework and this area of regulation. Political problems in relations with the West that have aggravated in recent years, and their negative impact on economic relations, especially in the energy industry, make this problem especially urgent. Along with civil law relations concerning corporate relations, supply, contractor, leasing, licensing agreements, etc., energy projects (as elements of investment projects) involve the issues of subsoil use, water resources, and ecology. Besides, the energy industry, being a universal basis of the economy, also determines the problems of the economic security of the country, i.e., from the legal standpoint, refers to the area involving public law and order. Over the past years, a legal system in Russia that is necessary to regulate investment relations in the energy sector has developed. The task of its further development is not to create any special conditions for foreign investors including conditions for a special dispute resolution procedure but to ensure a general investment regime based on fair competition.

Keywords: *energy law; legal regulation of investment projects in the energy sector; dispute resolution procedure.*

Characteristics of the existing laws

From 1987 onwards, the Soviet and then the Russian investment regulation were conceptually built as universal and multipurpose one, designed for the development of all sectors of the economy. This process took place in the conditions of «political romanticism»: the fall of the Iron Curtain, the destruction of real and imaginary walls, the dissolution of the military bloc, and so on and so forth. The sphere of economics revolved against the fervent desire to join the WTO and fulfill the requirements set by this organization to the Russian laws. Finally, in the field of law, an objectively critical attitude to the own laws rooted in the non-market principles of legal development formed. The exception was the international commercial arbitration successfully operating since the 1930s.

Such attitude influenced the nature of the legal policy of Russia in relation to the regulation of foreign investments. The main

idea reduced to the task of creating law and order that would be attractive for foreign investments and be a reliable protection of the rights and interests of foreign investors. The Russian interest in foreign investments was mainly associated with the attraction of a wide range of advanced technologies. This law and order started to take shape at the national and international levels. The main legal institutions that guarantee the protection of the rights and interests of a foreign investor are guarantees against nationalization and expropriation of investments; stability of laws of the recipient country ensured by the so-called grandfather clause; corporate law convenient for the investor and the withdrawal of investment disputes to a foreign jurisdiction. Besides, the attractiveness of foreign investments was ensured by the special regime in the field of public law: tax, customs, and foreign exchange regulation.

For more than half a century, the international commercial arbitration has been viewed not only as the best way to protect the rights of investors, but also as a necessary condition for the establishment of a favorable investment climate in the recipient country. The system of concluded international treaties has been considered a guarantee of the stability of the legal regime for foreign investments secured by national laws. Attention is drawn to the fact that these are international investment protection agreements, both multilateral and bilateral, that consistently consolidate the arbitration dispute review procedure in a third country as an indisputable priority of form.

However, this approach supported by the doctrine and practice of industrialized countries has not always been shared by developing countries. For example, the problematic character of the use of the «third country law and arbitration» approach in respect to the international technology transfer dates back to the 1970s and the 1980s. This problem has ruined the almost finished International Technology Transfer Code. The existing experience should serve as a serious warning even now when the problems of energy innovations in the context of the search for alternative energy sources are of particular importance.

If we turn to the Russian experience, it should be noted that the problem of review of investment disputes in commercial arbitration arose, in fact, in the late 1980s, when the first joint ventures with foreign participation started to appear in the USSR. Thus, Clause 20 of Resolution of the Council of Ministers of the USSR No. 49 of January 13, 1987, On the Procedure for the Establishment of Joint Ventures with the Participation of Soviet Organizations and Firms of Capitalist and Developing Countries and on the Activities Thereof in the Territory of the USSR stipulated that the «Disputes between Soviet enterprises and the Soviet state, cooperative and other public organizations, disputes between Soviet enterprises themselves as well as disputes between the parties to a joint venture on the issues related to its activities are resolved in the courts of the USSR or in an arbitration court, as the parties may agree, in accordance with the laws of the USSR». The cited provision clearly reflects the legal policy of the state at that time. Firstly, the exclusive Soviet jurisdiction was established when applying to the judicial form of protection of rights. Secondly, an alternative (arbitration) form of protection of rights was admissible based on an agreement between the parties. Interestingly, the arbitration proceedings were not linked exclusively to the territory of the USSR. As for the need for an agreement between the parties on the arbitration dispute review procedure, this meant, among other things, determination of the nature of disputes referred to the arbitration court (admissibility of arbitration proceedings). The choice of a Russian or foreign arbitration court was left to the discretion of the parties.

Foreign investment regulation was not limited to national laws alone. Practice also followed the path of the establishment of international law regulation.

Since then, a significant number of bilateral agreements on the promotion and protection of investments have been concluded, and remain in force. As for the multilateral conventions

providing for the arbitration procedure for resolution of investment disputes, in particular, the Washington Convention 1965 and the Energy Charter Treaty 1994, Russia has signed these international treaties but has not ratified them. The bilateral agreements on the promotion and protection of investments concluded from the end of the 1980s onwards between Russia and foreign countries contain provisions concerning two categories of disputes and, accordingly, two legal forms of settlement of such disputes. The first category includes disputes between contracting states relating to the interpretation or application of the Agreement on the Promotion and Mutual Protection of Investments. In this case, we are talking about the use of legal forms and the procedure in force in respect of international public disputes between subjects of international law. Thus, for example, the Agreement between the Government of the USSR and the Government of the French Republic of July 4, 1989, provides for the possibility of applying to an arbitration court and receiving assistance in the organization of proceedings from the Secretary-General of the United Nations. The subject of such disputes may be the fact of non-fulfillment by one contracting state of its obligations before another contracting state under a concluded international agreement.

The second category includes disputes concerning measures taken by the recipient state in relation to a foreign investor, its property, property rights, and interests. Articles of the relevant bilateral international agreements imply the transfer of almost any dispute between an investor and the recipient state (the Russian Federation) to a specialized investment arbitration or a general competence arbitration located in a third country. At the same time, practice has shown that in a number of cases foreign investors have filed claims to courts of foreign states in investment project related cases against Russian legal entities and the Russian Federation. Interestingly, the chosen foreign jurisdiction has not had any «effective legal connection» to the stated requirements, as, for example, the long arm rule doctrine demands.

The arbitration procedure for settlement of investment disputes has also become dominant in relations between foreign investors and their Russian counterparties (Russian legal entities). An arbitration clause whereby «all disputes under this agreement or in connection with it» are subject to review by the international commercial arbitration agreed by the parties has been widely introduced into the investment project practice. As a rule, this means international commercial arbitration in a third country.

What are the implications of this choice of the dispute settlement procedure? Practice, and not only domestic practice, has shown that a whole range of possible disagreements arise in the changing world in all forms and spheres of business including energy investment projects, many of such disagreements are not subject to fair peaceful settlement through negotiations since they are generated by changes in the laws of the recipient country or cannot be resolved through arbitration in that country due to their nature. *Projects where the Russian party is a legal entity with state participation are especially difficult in terms of investment dispute settlement. It is not uncommon for an investor, despite the fundamental legal provisions on the several liability of the state and legal entities, to file a claim in foreign commercial arbitration against a legal entity and the state as joint and several defendants.* This results is forced arbitration proceedings for the Russian party or «tacit loss», i.e., a situation when the party at a disadvantage is forced to accept it as it objectively risks losing a possible procedure in commercial arbitration held in a third state.

Bearing this in mind, is international commercial arbitration, which has objectively earned an excellent reputation as a form of settlement of commercial disputes, always uncompromisingly suitable for the settlement of any disputes related to investment projects? It is hardly possible to give an unambiguous answer to this question since investment projects are very diverse in their legal nature. Projects in the

energy sector take up a special place. [1] Along with civil law relations concerning corporate relations, supply, contractor, leasing, licensing agreements, etc. they involve the issues of subsoil use, water resources, and ecology (as elements of investment projects). [2] Besides, the energy industry, being a universal basis of the economy, also determines the problems of the economic security of the country, i.e. from the legal standpoint, refers to the area involving public law and order. [3] Finally, the duration of energy projects in the context of rapidly changing political, economic and technological paradigms creates conditions for their implementation that do not fit into the framework of the legal realities that existed at the time of forming of the energy project.

The features outlined above shaped up in the course of the thirty years of domestic practice, which makes it possible to make certain generalizations about the nature of the disagreements and disputes that have arisen as well as to assess the effectiveness of international commercial arbitration as a way of reviewing the same.

Private law disputes between investors. Corporate disputes; disputes related to the use of natural resources and disputes related to the innovative development of companies should be singled out in this group of disputes. It is noteworthy that the parties provide for the jurisdiction of the law of a third country over the concluded agreements in the establishment of corporate relations with the participation of a foreign investor. The arbitration clause included in the respective agreements provides for «arbitration in a third country». Despite the popularity of this practice, its effectiveness is highly questionable. The benefits related to the neutrality of the applicable law and place of forum that the investors expect, are lost against the serious differences in the methods and customs of doing business in different countries, as well as significant differences in the national corporate laws of states. International practice also argues against the reckless commitment to resort to foreign jurisdiction and foreign law of companies in corporate disputes related to investment projects. Thus, the resort to the legal integration within the European Union is illustrative of significant difficulties in unifying the corporate law, as the existing differences lie not only in the sphere of formal law but are also stemming from the peculiarities of social relations brought about by national traditions and national diversity. This factor, which is also valid in relation to Russia, is complemented by peculiarities of the formal legal nature. For example, Russian joint-stock laws contain serious imperative prescriptions limiting the contractual autonomy of project participants in the matters of corporate relations.

Disputes related to the use of natural resources inherently involve problems that go beyond the scope of private law regulation. Regulation of the use of subsoil, land, water resources is primarily a sphere of public law regulation, which objectively narrows the scope of application of foreign law and the use of arbitration as a form of dispute resolution. Thus, taking into account the fact that the resolution of the problem of applicable law and/or the recognition of the clause on applicable law depends on the dispute resolution place, the contractual clause «any disputes under the agreement and in connection therewith» are subject to review by international commercial arbitration of a third country based on the use of «neutral law» bears the risk of establishing a procedure for review of potential disputes that contradicts the laws of the recipient country and the chosen law can become an obstacle to achieving the set goals as it does not have an effective connection with the real business relations of the investment project implementation.

Disputes between a foreign investor and the recipient country. Since the adoption of the law on foreign investments, the issue of their nationalization and/or expropriation has been present both in international publications and in the programs of international scientific and business forums. For the first 16 years, the experts were discussing risks from a hypothetical standpoint due to the lack of examples.The YUKOS case was reviewed in 2003.

As a classic of the energy industry used to say: «It has never happened before, and not it happens again». The concept of «creeping expropriation» has appeared in the latest legal publications. [4] Leaving aside the discussion of the particulars of the YUKOS case as well as new doctrinal considerations, let us turn to the reasons for the emergence of claims of a foreign investor against reject a foreign investor as such. The origins of the conflict lie in the objective change in the fiscal, foreign exchange, foreign trade and other public law regulation applicable in the recipient country, on the one hand, and the interpretation of the grandfather clause/reservation clause, on the other hand.

The laws of any country undergo changes over time. From the viewpoint of rationality and from the standpoint of the requirement of equal legal treatment of market players, the system of preferences can be assessed only by the court at the place where the companies operate. A resort to a foreign jurisdiction will be nothing less than an interference with the public order of the recipient country.

The changing foreign policy situation, as well as the destruction of the relevant international legal principles of regulation of economic relations for the sake of the practice of unfair competition and economic sanctions, cause doubts about the effectiveness of existing agreements on the promotion and mutual protection of investments including the current investment dispute resolution mechanism.

The energy potential of Russia, the technological options for its development are the main factors that make the Russian economy attractive for investments. Over the past years, the legal system that is necessary to regulate investment relations in the energy sector has developed in Russia. The task of its further development is not to create any special conditions for foreign investors including conditions on a special dispute resolution procedure but to ensure a general investment regime based on fair competition. ■

References

1. Romanova V.V. Legal Regulation of the Balance and Protection of Interests of Parties to Public Relations in the Electric Power Industry / V.V. Romanova // Court of Arbitration. 2017. No. 2 (110). P. 204–213.
2. Lisitsyn-Svetlanov A.G. Problems of International Legal Regulation in the Energy Industry (on the Example of the Hydrocarbon Complex) / A.G. Lisitsyn-Svetlanov // Energy Law Forum. 2014. No. 3. P. 15–17.
3. Romanova V.V. Energy Law Order: Current State and Tasks / V.V. Romanova. Moscow : Yurist, 2016. 255 p.
4. Budnetskiy N.S. Correlation between the Provisions of Private International and National Civil Law on Expropriation of Investments in Real Estate and Seizure Thereof (Review of the Practice) / N.S. Budnetskiy // Public and Private International Law. 2019. No. 2. P. 13–16. ; Shaposhnikova O.S. International Investment Arbitration and the Right of States to Carry out Legal Regulation / O.S. Shaposhnikova // V.A. Kabatov, S.N. Lebedev. Collection of memoirs, articles, other files / scientific editor A.I. Muranov, O.N. Zimenkova, A.A. Kostin ; compiled by A.I. Muranov ; editor P.D. Savkin. Moscow : Statute, 2017. P. 769–817.