THE PROSPECT OF TOBACCO CONTROL REGIME IN UZBEKISTAN IN LIGHT OF POTENTIAL DISPUTE UNDER THE UK-UZBEKISTAN BIT

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ANNOTATION

This thesis highlights the difficulties in improving tobacco control measures in the light of protection of public health and investment by transnational tobacco company (BAT). Above-mentioned evidences prove that developing states face great challenges in implementing effective tobacco control scheme where the investor is major tobacco industry. Thereby, effective control policies are much needed when attracting an investment into domestic economy. Yet, the ability of BAT to shape public policies assumes particular importance in terms of WHO FCTC. After becoming a signatory party of the Convention, Uzbekistan must fulfill the requirements of the Convention and work out tobacco control regime. On the other hand, this move may also heighten the opportunity of BAT to shape the legislation or to encourage the pre-emptive adoption of ineffective measures.

Key words: investment law, bilateral investment treaty, investment dispute, tobacco packaging, lawsuit, stabilization clause.

Problem statement

In order to shed light on this matter, the study objective of the research is to analyze the legal consequences of Uzbekistan BAT case with the respect to Investment law. In fact, scholars do not exclude that the hypothesis of being sued by BAT on current matter against Uzbekistan in the future. This is so because, owing to

the research findings above, BAT immediately proposed amendments to the Health decree, which was completely contradicting for BAT’s interests. Also, it is not a secret that BAT shaped the legal system in favor of itself threating to terminate investment contract between Parties. Thereby, taking into consideration the fact that Uzbekistan is becoming a member of WHO FCTC and it is obliged to observe the requirements of the Convention. In other words, Uzbekistan has to implement strong tobacco control measures, which may overlap BAT’s interests. If so, there is much possibility that BAT will launch a lawsuit against Uzbekistan regarding to the Investment contract between parties and The UK v Uzbekistan BIT that was signed in 1994[8].

Therefore, the research will seek to study following questions in below:

First, in case of investment dispute between Uzbekistan v BAT, what will be possible outcomes of the case?

If BAT sues against Uzbekistan on the ground of investment, it will be based on BIT between The UK government and the government of Uzbekistan[9]. According to the Article 8 of the BIT, the dispute between contracting parties may refers either to:

(i) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings);

(ii) the Court of Arbitration of the International Chamber of Commerce;

(iii) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL rules)[10].

[8] http://investmentpolicyhub.unctad.org/Download/TreatyFile/3543

[9] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Uzbekistan for the Promotion and Protection of Investments

[10] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Uzbekistan for the Promotion and Protection of Investments, Article 8

The dispute may be very close to ongoing case between Australia v Phillip Morris Asia (PMA) in terms of investment interactions of tobacco control mechanism.

Phillip Morris Asia v Australia case[11]

In 2011, Phillip Morris Asia (PMA) claimed against Australia’s plain packaging scheme under the Australian- Hong Kong BIT. In fact, it must be clarified whether PMA’s claim would be consistent to requirement of having made a relevant investment, whether plain packaging scheme would constitute an expropriation or breach of fair and equitable treatment obligation and how other investment protection standards could be efficient under this claim. Almost all Australian BITs and FTAs give a right to investors to claim either under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) or ad hoc tribunals attached to Arbitration Rules of United Nations Commission on International Trade Law (UNCITRAL). As it was set under the Australian- Hong Kong BIT, parties (PMA and Australia) would file a dispute to ad hoc tribunal (UNICTRAL) in order to settle the case. Even though many issues stay unclear in this case, in the point of many scholars’ view, Australia would have strong arguments to win the plain packaging case against Phillip Morris Asia. Only applying Salini test, art 25 of ICSID Convention, might fail the case in initial phase on the ground of lacking “ratione materie” due to the fact that tobacco companies are not contributing to Australia’s economic development. Instead of this, they are causing harm public health in Australia. Assuming the basic requirements of an investment claim, plain packaging is unlikely to violate any of substantive obligations in Australia’s investment treaties. The greatest danger for Australia could be claim on partial expropriation of investor’s trademarks. On 17 December, 2015, it was

[11] Voon T., Mitchell A. Time to quit? Assessing international investment claims against plain tobacco packaging in Australia //Journal of International Economic Law. – 2011. – T. 14. – №. 3. – P. 515-552.

rendered the first part of Arbitral Award of the case in favor of Australia. However, the rendered award has not been disclosed to public yet.

Back to the case of Uzbekistan v BAT, in case of dispute, the parties try to grasp every article of the BIT as a counter argument against each other. For instance, full protection and security, FET and other investment protection standards might be taken as infringing tool by mostly investor, BAT. Basically, *stabilization clause* may be controversial target among the parties.

Second, why does stabilization clause may be as controversial for parties?

A different legal technique that may reconcile between the rival interests of regulatory flexibility and legal predictability is embodied in stabilization clauses included in some contracts between host states and foreign investors[12]. These contractual clauses directly address the issue of regulatory changes undertaken by the host state during the investment period. Stabilization clauses are designed to make new laws or regulatory changes inapplicable to the particular investment project; or providing that although new regulatory measures are applicable to the investment, the investor will be compensated for the cost of compliance with them. Stabilization clause may be controversial for parties because of:

First, not all investment contracts include such provisions but they are common in long-term investments such as Uzbekistan and BAT (signed in 1994);

Second, it has been twenty two years since BAT entered domestic market of Uzbekistan. Also, promoted stabilization clause in investment contract between the government of Uzbekistan and BAT makes the tobacco company illegible to evoke lawsuit against Uzbekistan on the ground of stabilization clause;

Third, in case of dispute, the first ground for filing against Uzbekistan will probably be stabilization clause regarding to the above-mentioned evidences.

Third, what can be counter argument for Uzbekistan in case BAT launches Investor-State dispute?

[12] Hirsch, Moshe. "Between fair and equitable treatment and stabilization clause: stable legal environment and regulatory change in international investment law." J. World Investment & Trade 12 (2011): 783.

Arguable counter argument for Uzbekistan against BAT would be promotion or protection of public health. According to the report in 2014 by the Ministry of Health of the Republic of Uzbekistan, one fifth of all population is smokers[13]. In fact, this data approves that tobacco industry (BAT) is causing great damage to public health in Uzbekistan. Furthermore, the US has recently proposed a provision as part of much-contested Trans-Pacific Partnership (TPP) agreement that would keep tobacco companies from threatening governments with lawsuits for passing anti-tobacco regulations. So that the members of TPP exempted the investor-state dispute settlement (ISDS) mechanism for tobacco products, effectively blocking the tobacco industry from launching disputes under the TPP. The proposal has been agreed by eleven member countries so far. Carving out of tobacco industry from the protection of foreign investments is not a great victory for the TPP countries but also a big step forwarding to protect of public health in the world. Finally yet importantly, Uzbekistan can make counter argument in terms of caring public health if BAT files against it.

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[13] http://apps.who.int/fctc/implementation/database/sites/implementation/files/documents/reports/uzbekistan2014report_final.pdf

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