

DENIAL OF JUSTICE TO FOREIGN INVESTORS

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Recibido: 15.10.2010 / Aceptado: 09.11.2010

Resumen: El derecho de todo inversionista a acceder a la justicia (ya sea jurisdicción interna o internacional), así como su calificación jurídica, han sido objeto de numerosos artículos y estudios, restándole novedad a prácticamente cualquier análisis al respecto. Las situaciones en que dicho acceso ha sido obstaculizado, sin embargo, no han suscitado el mismo interés. Es la razón que nos ha impulsado a dedicarles el presente análisis; el cual, dada la especial naturaleza del Derecho de las Inversiones Internacionales, nos ha parecido coherente centrar en las decisiones entregadas por la justicia arbitral, más que en las pocas discusiones doctrinarias al respecto.

Palabras clave: denegación de justicia, inversión extranjera, arbitraje internacional, mala fe, trato justo y equitativo.

Abstract: The right of every investor to access justice (whether domestic or international), and its juridical qualification, have been the subject of numerous articles and studies, lessening novelty to any analysis thereof. Situations where such access has been hampered, however, did not elicit the same interest. It is the reason that has prompted us to compose the present analysis, which, given the special nature of International Investment Law, seemed consistent to focus on the decisions delivered by the arbitral justice, rather than the few doctrinal discussions regarding this subject.

Key words: denial of justice, foreign direct investment, International arbitration, bad faith, fair and equitable treatment.

Sumario: I. Introduction. II. The impediment of access to the courts. III. Breaches of the principle of fair and equitable procedure. 1. The denial of justice by the administration. 2. The denial of justice by the ordinary courts. IV. Conclusion.

I. Introduction

1. Access to justice is «the right of every person to have a forum in which to assert the right that she considers to be assisted and to obtain the satisfaction of it»¹. We can then clearly distinguish the two major components of the notion: the right of access to the courts and the right to a fair and equitable procedure.

2. In international investment law, access to justice has a particularly important character because of the arbitrariness that an investor can experience, due to his foreign status. It must be remembered that although the international law obligations incumbent on every State regarding the protection and the

¹ J. MARABOTTO, «Un derecho humano esencial: el acceso a la justicia», *Anuario de Derecho Constitucional Mexicano*, 2003, p. 291.

respect for foreigners, there have been cases in which they exercised their authority abusively, affecting investors rights.

3. In the matter of foreign investment, the denial of justice must then be understood as «any failure of the State concerning its duty to organize and to exercise the judicial function, in order to ensure [foreign investors] minimal judicial protection»². In other words, obstruction of access to justice can take place by preventing access to the courts, or ignoring the right to a fair and equitable procedure.

II. The impediment of access to the courts

4. The fairness inherent to courts and the fair and equitable procedure, to which every person is entitled to, become worthless if the possibility of access to those courts is not guaranteed³. Arbitral tribunals have confirmed its importance, in the way we will proceed to explain:

5. The first example is the case that confronted the Iranian society NIOC with Israel. When a dispute arose between them, the State of Israel refused to choose an arbitrator to hear the case (situation not covered by the arbitration clause), thereby preventing the investor the possibility to access arbitral justice. In addition, to make it worse for the investor, we must remember that after the *Manbar*⁴ case, NIOC society was in total inability to access any type of jurisdiction, Iranian, Israeli and even international.

6. As the clause provided that in case of disagreement between the arbitrators appointed by the parties, the President would be chosen by the President of the International Chamber of Commerce in Paris, NIOC referred the matter to French domestic jurisdictions in order to obtain a favourable decision.

7. Besides the decision of the *TGI* of Paris that rejected the lawsuit, what is really interesting to emphasize, are the texts subsequently issued from the rulings of the Court of Appeal of Paris and the *Cour de Cassation* respectively.

8. The Court of Appeal held that NIOC society was indeed in absolute inability to access any jurisdiction; in consequence, considering that adopting a passive attitude would turn also into a denial of justice, the Court ruled in favour of the investor, giving Israel within one month to appoint an arbitrator.

9. The *Cour de Cassation* confirmed the decision on appeal, adding that by virtue of a connection with France, the denial of justice, even if not part of the conditions provided by Article 1493 of the *Code de Procédure Civile*, may grant jurisdiction to the French courts, as long as the international public order is respected. Thus, it ruled that: «l'impossibilité pour une partie d'accéder au juge, fût-il arbitral, chargé de statuer sur sa prétention, à l'exclusion de toute juridiction étatique, et d'exercer ainsi un droit qui relève de l'ordre public international consacré par les principes de l'arbitrage international et l'article 6.1, de la Convention européenne des droits de l'homme, constitue un déni de justice qui fonde la compétence internationale du président du tribunal de grande instance de Paris, dans la mission d'assistance et de coopération du juge étatique à la constitution d'un tribunal arbitral, dès lors qu'il existe un rattachement avec la France»⁵.

² G. CORNU, *Vocabulaire Juridique*, PUF, 2009, Paris, p. 291

³ R. PELLOUX, «L'arrêt Golder de la Cour européenne des Droits de l'homme», *Annuaire Français de Droit International*, Vol. 21, 1975, p. 336

⁴ This judgment considered Iran as an enemy State, preventing the Israeli courts to recognize or enforce any ruling issued by Iranian courts. In addition, from that moment, no Israeli court could process any request filed by an Iranian citizen. F. KAHN «Investissements internationaux et droits de l'homme», en F. HORCHANI, *Où va le droit de l'investissement ? Désordre normatif et recherche d'équilibre*, p. 99

⁵ Cass. Civ. 1^{ère}, February 1, 2005 n°404, *Israel v. NIOC*, *Bull.* 2005 I n°53 p. 45

10. French authors, however, have not unanimously support this award. Some praise it saying that it is an accomplishment of the moralization process of arbitration⁶, and that it would virtually grant universal jurisdiction to the French *juge d'appui* to avoid a denial of justice in international arbitration⁷. Other authors, without directly criticizing it, consider that the French courts have gone too far: In this sense, they do not believe that France is vested with special powers to provide assistance to all litigants around the world who lack arbitrators. Professor Bertrand ANCEL has very well expressed this situation, though not without irony, by pointing: «Voici donc l'ordre juridictionnel français rivalisant avec les ONG, Médecins sans frontières, Reporters sans frontières, *Tribunaux sans frontières!*»⁸.

11. A more recent and illustrative case is the one that confronted the Italian company *Saipem* and Bangladesh to a vast number of jurisdictions, both domestic and international. The contract signed between both parties concerned the construction of a pipeline, whose delivery could not be fulfilled, primarily due to sabotage and to the strong opposition of local people: A dispute quickly arose between the parties based on the nonperformance of the contract.

12. In accordance with the investment contract, *Saipem* filed a petition for arbitration before the ICC. The state-owned *Petrobangla* opposed it before the domestic courts of Bangladesh, arguing that the ICC had no jurisdiction in this matter. The legal basis would be in Article 5 of the Bangladesh Arbitration Act from 1940⁹, which would give domestic courts priority over international jurisdiction. Under the terms of the Court of Appeal of Dhaka, the arbitral tribunal would have clearly ignored the law¹⁰, causing the Supreme Court of Bangladesh to consider the ICC tribunal's ruling to be void. This led *Saipem* to search for ICSID protection, under the BIT signed between Italy and Bangladesh.

13. Although the case brought before the ICSID is mainly about the expropriation of the investment, what is really interesting for our analysis, is the court's conclusion concerning the obstacles Bangladesh came up with to prevent *Saipem* from accessing the arbitral justice. The reasoning was developed based on the notion of abuse of rights. In this regard, the tribunal recognized that the authority of an arbitrator can be challenged in absence or misapplication of the law; however, none of these circumstances took place. According to the tribunal, to arbitrarily prevent the investor's access to a court, through the misuse of States judicial control power is contrary to the internationally accepted principle that prohibits the abuse of rights¹¹.

14. What seems interesting to notice is that the Asian State has resorted to all legal instruments, which became unlawful after depriving the investor of one of the fundamental rights that he had. As we shall see, the situation is quite similar when access to justice is hampered by the inobservance of the rules regarding fair and equitable procedure.

III. Breaches of the principle of fair and equitable procedure

15. The principle that states the need of a fair and equitable procedure may be disregarded, from our point of view, both by the administrative authorities (broadly defined), and the ordinary courts (regardless of the instance).

⁶ S. LAZAREFF, «De la parole donnée...», *Les Cahiers de l'Arbitrage. Gazette du Palais*, n° 2007/2, p. 4

⁷ Cass. Civ. 1^{ère}, February 1, 2005, État d'Israël c/ Société National Iranian Oil Company (NIOC), note H. MUIR WATT, *Revue de l'arbitrage*, 2005, n°3

⁸ B. ANCEL, «L'arbitrage commercial international au pays des lumières», in R. MÉNDEZ-SILVA, *Contratación y arbitraje internacionales*, Instituto de Investigaciones Jurídicas, México D.F., 2010, p. 201

⁹ Art. 5: «The authority of the appointed Arbitrator or umpire shall not be revocable except by leave of the court, unless a contrary intention is expressed in the arbitration agreement»

¹⁰ *Saipem S.p.A. v. Bangladesh*, ICSID ARB/05/7, award (June 30, 2009) §155 <http://ita.law.uvic.ca/>

¹¹ «In conclusion, the Tribunal is of the opinion that the Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights», *Saipem v. Bangladesh*, Ibid. §160

1. The denial of justice by the administration

16. The hypothesis of the host State's administration being the one that obstructs access to justice cannot be discarded, because as we know, most of the activities of investors require the intervention of the administration, either through permits, approvals, etc. The State in such cases, is just exercising its sovereign power. But, how far can he go?

17. The determination of the boundaries between legality and illegality of States actions is extremely difficult, and few jurisprudence can be found in this respect; the reason is that arbitral tribunals have been very cautious, in order to avoid interfering in specific aspects of national sovereignty¹².

18. However, it is an essential element to us. Recognition of this kind of denial of justice could open new possibilities of defense for investors, since it seems to be linked to the fair and equitable treatment standard.

19. Some tribunal judgments have covered this topic, adopting interesting conclusions. The first that deserves to be mentioned is the well-known case of *Metalclad v. Mexico*¹³, where one of the ICSID tribunal's task, was to evaluate the procedure that denied the construction permit to the investor. From the analysis made, authors have concluded that one of the factors taken into account by the tribunal to determine whether there was a denial of justice or not, was the legitimacy of the procedure. And even more specifically, whether or not the investor had internal channels for the review of administrative decisions that directly concerned him¹⁴. The tribunal finally considered being in the presence of a denial of justice, since «the permit was denied at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear»¹⁵.

20. A more recent case to be commented is the *Middle East Cement v. Egypt*¹⁶ case. The Arab State, after a series of disputes with the investor, decided to seize a ship belonging to the latter and sell it at auction, as a compensation for a debt equivalent to £ 103,033.97, which would *Middle East Cement* had with the State. Despite Egyptian claims concerning the respect for its domestic law throughout the procedure, the ICSID tribunal decided to conduct a dual analysis of the situation, in terms of both domestic and international law. The result was the verification of a denial of justice.

21. In effect, the investor had never been notified, because the government authorities had acted in bad faith. Therefore, the arbitral tribunal held that the investor had been deprived of access to justice, by means of depriving him of a fair and equitable treatment, adding that a situation «as important as the seizure and auctioning of a ship of the claimant should have been notified by a direct communication»¹⁷.

22. It is interesting to notice that the denial of justice and the fair and equitable treatment standard, which all investors are entitled to, appear to be in close harmony, which, as we already said, may offer the investor an additional way to protect its investment in case of arbitrary administrative decisions. As noted by the arbitral tribunal in the *Genin c. Estonia*¹⁸ case, the fair and equitable treatment gives «a basic and general standard which is detached from the host State's domestic law».

¹² I. KNOLL-TUDOR, «The fair and equitable treatment standard and human rights norms», in P.-M. DUPUY, F. FRANCONI & E.-U. PETERSMANN, *Human Rights in International Investment Law and Arbitration*, Oxford University Press, Wiltshire, 2009, p. 323

¹³ *Metalclad Corporation v. Mexico*, ICSID ARB(AF)/97/1, award (August 30, 2000) <http://icsid.worldbank.org/>

¹⁴ I. KNOLL-TUDOR, *op. cit.* n° 12, p. 323

¹⁵ *Metalclad Corporation v. Mexico*, *cit. supra.* n°13, §91

¹⁶ *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID ARB/99/6, award (April 12, 2002) <http://icsid.worldbank.org>

¹⁷ *Ibid.* §143

¹⁸ *Alex Genin & Others v. Estonia*, ICSID ARB/99/2, award (June 25, 2001) §367 <http://icsid.worldbank.org/>

2. The denial of justice by the ordinary courts

23. As we mentioned, when a dispute arises, the State has to guarantee everyone the access to its domestic jurisdictions as well as a fair, equitable and impartial procedure. Certainly, this also applies to international investments.

24. In this sense, the most emblematic case regarding foreign investment is *Læwen v. United States*¹⁹, where the Canadian group was sentenced by a U.S. court by means of an unjust procedure, leading to bankruptcy just a few years later. Hence, it filed a complaint before the ICSID under the NAFTA arbitration rules, alleging among other reasons, lack of a fair and equitable procedure, and discrimination that it was subjected to by U.S. jurisdictions, because of its nationality²⁰.

25. The tribunal judgment was very interesting; despite having rejected *Læwen*'s claim for failure to exhaust domestic remedies previously. Indeed, the court recognized the denial of justice by the jurisdiction of Minnesota, and therefore, the violation of the right to access justice. In this regard, the court noted that «[b]y any standard of measurement, the trial involving O'Keefe and Læwen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Læwen the process that was due» and that «[i]n the present case, the trial court permitted the jury to be influenced by persistent appeals to local favoritism as against a foreign litigant»²¹.

26. Then, the question that arises is: What constitutes a denial of justice during the course of judicial proceedings? According to *Læwen*'s tribunal, for violating Article 1105 of NAFTA «[a] manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial property is enough». And it is not the first judgement in this direction; ICSID tribunal in the *Azinian v. Mexico* case, considered that the denial of justice is synonymous of «clear and malicious misapplication of the law»²².

27. From the above, we can say that today, the notion of bad faith is a synonymous for denial of justice to arbitral jurisdictions. The fraud or bad faith implies the existence of an intention to injure, so that in principle, very few cases should be affected by this vice of consent. Then, we may ask the question: What happens in cases where it is not the fraud, but the negligence of the court, that will lead to an unjust result? In other words, can the simple negligence be considered resulting in a denial of justice?

28. International courts and authors have not pronounced themselves explicitly in this respect. This is why we think it is so important to provide a possible solution. In this regard, we believe that only the fraud can be a basis for denial of justice: Higher instances of each domestic jurisdiction can easily solve injustices arising from the negligence.

29. The *culpa lata* or gross negligence, however, might make us hesitate, given that it involves extremely careless actions or omissions, which are almost always equivalent to the fraud: *Culpa lata dolo æquiparatur*. In this regard, it seems impossible to us that in a procedure, all the domestic instances would make mistakes of this magnitude without a prior agreement, in order to harm the party. Thus, only the fraud can be considered as a source of denial of justice.

¹⁹ *The Læwen Group, Inc. & Raymond L. Læwen v. United States*, ICSID ARB (AF)/98/3, award (June 26, 2003) <http://www.state.gov/documents/organization/3921.pdf>

²⁰ P. KAHN, *op. cit.* n°4, p. 99

²¹ *The Læwen Group, Inc. & Raymond L. Læwen v. United States*, *cit. supra.* n°19, §119

²² *Robert Azinian & Others v. Mexico*, ICSID ARB(AF)/97/2, award (November 1, 1999) §103 <http://icsid.worldbank.org/>

IV. Conclusion

30. Access to justice is one of the most important human rights²³ that a person can have. This is why it is recognized as a fundamental right and therefore constitutionally protected in almost every domestic legal system, and in international law²⁴.

31. In the matter of foreign investment, this right acquires a very important dimension, specially because of the principle of fair treatment that every State must give to foreigners, who obviously are in a position of helplessness against possible arbitrariness.

32. Thus, government's probity appears to be the cornerstone of the system, in order to avoid any abuse of this type. The administrative authorities are charged with the duty of acting in good faith in all their activities that may affect the citizen's rights. This obligation also weigh on the judges (public servants after all) who must take all measures to ensure that the procedure is carried out in accordance with the law, and justify their decisions.

33. However, the obligations not only burden on public servants, but on everyone who presents itself before them asking to exercise their authority. In this sense, the investor is forced to accept decisions legitimately taken by these authorities, and if he considers that his right to access justice has been maliciously hindered, bad faith must be duly proven. Otherwise, the arbitral justice would end up being used as a «third instance» by investors, in order to obtain a review of the facts, every time they would obtain an unfavourable decision from domestic courts²⁵.

34. Besides, this was the position of the tribunal in the *Azinian v. Mexico* case, where it held that «the possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction»²⁶. Decision that has been followed by other courts, particularly in the *Monved v. United States* case, which stated that «[u]nder NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal»²⁷.

²³ If we accept the possibility of a human rights hierarchy

²⁴ C. HECKER, «El acceso a la justicia y la inversión extranjera», *Actualidad Jurídica, Revista de Derecho de la Universidad del Desarrollo*, year XI, n°22, July 2010, pp. 205-209

²⁵ I. KNOLL-TUDOR, *op. cit.* n°12 p. 323

²⁶ *Robert Azinian & Others v. Mexico*, *cit. supra.* n°22, §99

²⁷ *Monved International Ltd. v. United States*, ICSID ARB(AF)/99/2, award (October 11, 2002) §126 <http://www.state.gov/documents/organization/14442.pdf>