DEFENSES OF STATES IN INVESTMENT ARBITRATION:

Theoretical Case Study of Lydian International Ltd v. the Republic of Armenia

Gold extraction projects are considered the most dangerous ones in the world. Amulsar mine is one of the largest mining projects in the world today and is the largest international investment in Armenia[1] by Lydian Armenia OJSC (hereinafter the "Company" and/or "Investor"), the Amulsar mine (hereinafter the "Mine") exploitation company.[2] More than $ 400 million has been invested in the project. More than 1,300 people will be involved in the construction and 700 permanent jobs will be created during the next 10 years.[3] Lydian Armenia is the ninth largest taxpayer in Armenia, yet it is still under construction.[4]

In 2012, the Company already had all necessary licenses and permits to start the exploitation of the Mine.[5] However, some experts and environmentalists envisage potential risks of the Mine explosion and also during exploitation process, such as contamination of rivers and Lake Sevan, environmental pollution, clouds of dust, large portions of cyanide, harmful for to the health of the population.[6]

From May 2018 to present, the environmentalists and the residents of the Amulsar area have been closing the roads leading to Amulsar and demanding to stop the exploitation of the Mine for it was causing large environmental and health problems.[7]

Media reports of 2018 alleged earlier that Lydian Armenia is planning to file a lawsuit against the Republic of Armenia, demanding $2 billion from Armenian authorities for failure to provide conditions for the Company's normal operation. It is assumed that the Company will demand compensation for damages caused and loss of profit due to suspension of its operations and /or indirect expropriation.[8]

POSSIBLE CLAIMS TO BE RAISED BY THE INVESTOR

It is assumed that the Dispute will be based on the Agreement on the Promotion and Protection of Investments between the Government of the Republic of Armenia and the Government of Canada signed on 29 March, 1999 (hereinafter referred to as the "Agreement")9.

According to Paragraph (2) of Article XIII of the Agreement, If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with Paragraph (4), which states that the dispute may be submitted to the arbitration under The International Centre for the Settlement of Investment Disputes (ICSID).

Accordingly, should Lydian decide to proceed with ICSID arbitration, the likely grounds for the claims are assumed to be the following:

[1] https://armenpress.am/arm/news/925283/ (last visited Feb. 11, 2019).
[2] https://www.azatutyun.am/a/27934977.html (last visited Feb. 11, 2019).
[3] https://www.lydianarmenia.am/index.php?m=pages&lang=eng&p=94
[4] http://www.harkatu.am/companies/hy;jsessionid=B707245C49DDB10EA4E67C2B6C4779AA?0 (last visited Feb. 11, 2019)
[5] https://www.youtube.com/watch?v=LWhbwVIvhq8 (last visited Feb. 11, 2019).
[6] https://hetq.am/hy/article/68681 (last visited Feb. 11, 2019).
[7] https://hetq.am/hy/article/90775 (last visited Feb. 11, 2019).
[8] https://panarmenian.net/eng/news/256626/Lydian_Armenia_refutes_reports_on_suing_Armenia (last visited Feb. 11, 2019).

[9] https://investmentpolicyhub.unctad.org/Download/TreatyFile/143 (last visited March 12, 2019)

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1.1 Breach of the Fair and Equitable Treatment Standard by the State

Article 2 of the Agreement, titled *"Establishment, Acquisition and Protection of Investments"*, provides that each contracting party shall encourage and create favorable conditions for investors of other contracting parties to make investments. It goes further stating that such conditions shall include a commitment to accord at all times to investments of investors of other contracting parties fair and equitable treatment. If police systematically fail to protect foreign-owned facilities, such inaction might indicate a policy of discrimination against foreign investors.[10]

In *MTD* v. *Chile*[11], *t*he claimant invoked the FET standard, claiming that the inconsistencies between the two arms of the same Government vis-à-vis the same investor had given rise to a breach of the FET standard. The Tribunal upheld the claim even though it could not identify any unilateral statement addressed to the investor that its investment would proceed, nor was that permissible under domestic law In reaching its conclusion the Tribunal found a breach of legitimate expectations relying on the investor's plans.

This decision the acknowledges the compensable nature of legitimate expectations as a matter of basic *fairness.* If the investor has been dragged into making an investment relying on the government's representations, assurances, promises and impressions, it would be unfair to stripe the investor off the economic value of its investment thus frustrating its legitimate and reasonable expectations. Similarly, an implicit cause in *Metalclad*[12] is the fact that the company heavily relied on Mexico's reassurances that all regulatory conditions in terms of environmental policy had been met.

Nearly the same scenario is with Lydian. It is claimed by the Company that it possesses all necessary licenses and permits to start the works in the Mine. They are all given by the previous Government creating a platform of legitimate expectations, hence was the milestone of the Company's 2018 business plan. Thus, the Company's legitimate expectations were frustrated. Therefore, there is a high probability that the first claim the Company will bring against Armenia will be the breach of fair and equitable standard.

1.2 Breach of the Full Security and Protection Standard by the State

Article 2 (2) of the Agreement contains a provision granting "full" security and protection for investments suggesting that Armenia is under an obligation to take active measures to protect the investors', in this case Lydian's investments from adverse effects. Traditionally, the primary purpose of this standard was to protect the investor against physical violence, including invasion of the premises of the investment. However, case law supports the view that the formula 'full protection and security' covers not only protection against violence but also provides protection against infringements of the investor's rights.[13]

In the first scenario of the present dispute between the Company and the State if the Arbitral Tribunal finds that the State has violated treaty standards of FET and FPS, the State's argument based on its sovereign right, as a state to regulate, also known as the "police power" doctrine (or "PP") can hardly be

[10] Molly Zohn, *Filling the Void: International Legal Structures and Political Risk in Investment*, 2007 by the authors. Fordham International Law Journal is produced by The Berkeley Electronic Press (bepress). http://ir.lawnet.fordham.edu/ilj
[11] *MTD Chile* S.A. *v*. Republic of *Chile*, ICSID Case No. ARB/01/7 (May 25, 2004)
[12] *Metalclad Corp. v The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Aug. 30, 2000)
[13] *Azurix Corp v. Argentine Republic,* ICSID Case No. ARB/01/12 (July 14, 2006)

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a justifiable argument in defense. As precedence reference can be made to *Suez v. Argentina*[14] case, where the Tribunal held that, "the application of the police powers doctrine as an explicit, affirmative defense to treaty claims other than for expropriation is inappropriate, because … if a Tribunal finds that a State has violated treaty standards of fair and equitable treatment and full protection and security, it must of necessity have determined that such State has exceeded its reasonable right to regulate."

The second scenario in the present Dispute between the Company and the State refers to State's inaction and failure to protect Company's investments from third party blockades and physical attacks. In this scenario, if the Arbitral Tribunal finds that there is a violation of the FET and FPS standards, the State may be held liable. For example, in *Wena Hotels* case[15], the Tribunal concluded that "Egypt breached its obligations under Article 2(2) of the IPPA by failing to accord Wena's investments in Egypt "fair and equitable treatment" and "full protection and security." Even though the Egyptian Government did not authorize or participate in the attacks, its failure to prevent the seizures and subsequent failure to protect Wena's investments gave rise to liability. The Tribunal also found that "Egypt's actions amounted to an expropriation – transferring control of the hotels from Wena to EHC without "prompt, adequate and effective compensation" in violation of Article 5 of the IPPA."[16]

Hence, the Company may claim that Government's and/or police's failure to prevent blockades or unauthorized people to enter their workplace and protect their investment, gives rise to the breach of the full security and protection standard: provided, of course, that the Company proves that it was done with intentional negligence.

1.3 Indirect Expropriation of the Investment

Lydian may claim that the Government's "non-actions" gave rise to indirect expropriation of its investment as failure to or neglecting to remove the illegal blockades, ongoing government audits and inspections have resulted in construction schedule slippages that impacted the Company's ability to achieve its 2018 milestones. The blockades hindered the employers and employees of the Company to manage their business, which caused loss of control over their investment and deprivation of property rights.[17] These failures should all be deemed as *"non-actions"*, which are equal to *"acts tantamount to expropriation."* Article 5 (1) of the Agreement refers to *"measures having effect equivalent to nationalisation or expropriation"* - failing to protect against *"indirect"* or *"regulatory"* expropriations, or interferences by the State that have the effect of gradually eroding the investor's property interests. In a similar case, *Phillips Petroleum Co. v. Iran*, the panel pointed out that *"a series of concrete actions"* can form a deprivation of property, and refrained from excluding the possibility that non-action could form a type of indirect expropriation.[18] In the same context, commentators generally agree that the closest case to true creeping expropriation is the Somalia government's assorted actions or non-actions, including occasional arrests of

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[14] *Suez, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17 (July 30, 2010)
[15] *Wena Hotels LTD. v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4 (Dec. 8, 2000)
[16] Crawford, J., *ICSID Reports: Volume 8*, Cambridge University Press (2005), p. 15
[17]https://www.lydianinternational.co.uk/images/financial%20reports/2018/q3_2018_mda_final_no_links_version_-_pdf.pdf (last visited 22 March, 2019)
[18] *Phillips Petroleum Co. Iran v. Iran* , 21 Iran-U.S. Cl. Trib. Rep. 79, at 115–16 (1989).

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key employees and blocking access to the physical plant, against a foreign-owned shellfish processing facility, ultimately compelling the plant manager to terminate operations.[19]

Lydian may also substantiate its claim by Sole Effect Doctrine, which is generally in contradiction with Police Powers Doctrine. Tribunals have frequently upheld the Sole Effect Doctrine when the *intent* of the Government is less important than the *effects* of the measures on the owner and the *form* of the measures is less important than the *reality of their impact*'.[20] In *Santa Elena SA* v. *the Republic of Costa Rica,* the Tribunal noted that the purpose of the expropriation does not affect the obligation to compensate the investors:*"…Expropriatory environmental measures –no matter how laudable and beneficial to society as a whole – are, in this respect similar to any other expropriatory measure that a State may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the State 's obligation to pay compensation, remains."*[21]

DEFENSES OF STATES IN INVESTOR-STATE ARBITRATION IN THE CONTEXT OF LYDIAN INTERNATIONAL LTD V. REPUBLIC OF ARMENIA

2.1 Police Powers or the State's Right to Regulate in International Investment Law

Because of the lack of publicly available documents substantiating the alleged facts and evidences of the Case, we have to make assumptions and base our assumptions on the information that is publicly available. As a general rule in case an investor raises the argument, that the State has expropriated its investments by its positive actions, i.e. interferences, discriminatory inspections and/or temporary or permanent termination of the its license, the State may bring a preliminary objection claiming that there is no *prima facie* case for expropriation of the investor's assets. Moreover, even if the Tribunal finds that there was an expropriation of the investments, the State has to prove the lawfulness of it. If the actions are not qualified as expropriation, the State does not incur responsibility for the legitimate and *bona fide* exercise of sovereign police powers.[22]

The doctrine of police powers and State's right to regulate ("police powers") represents an attempt by investment tribunals to reconcile the sovereign right of the State, as the guardian of the general, public interest, to regulate economic activities on its territory with its treaty or contractual obligations. In particular, "the right of entering into international engagements is an attribute of State sovereignty."[23] Moreover, as noted by the *Framatome* tribunal, the same principle applies to contractual commitments as well.[24] As an ICSID tribunal put it: *"Governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek*

[19] As cited from Vance R. Koven*, Expropriation and the 'Jurisprudence' of OPIC*, (1981), pp. 269, 291; case citation is unavailable
[20] *Tippetts*, Abbett, McCarthy. Strattm *v. TAMS-AFFA*, Award No. 141-7-2 (29 June 1984)
[21] *Santa Elena S.A. v. Republic of Costa Rica*. ICSID Case No. ARB/96/1 (31 May, 1995)
[22] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International 2009), p. 358
[23] Permanent Court of International Justice, *S.S. "Wimbledon",* Judgment (17 August 1923), Series A, No. 1, p. 25
[24] *Framatome v. Atomic Energy Organization of Iran (A.E. O.I.),* ICC Case No. 3896, Award (30 April 1982).

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compensation."[25] Academic scholar Brownlie has stated, "*state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation*".[26]

In case the Company claims that economic damage was caused to its business, it can be argued that for example, in *Sedco*[27]*; Methanex*[28]; *TECMED*[29] cases the Tribunal held a principle, according to which 'the State's exercise of sovereign powers within the framework of police power may cause economic damage to those subject to its powers as administrator, without entitling them to any compensation whatsoever, is undisputable' (§119).

In *Starrett Housing v. Iran* [30], the Tribunal held that *"…investors have to assume a risk that the country might experience strikes, lockouts, disturbances, changes in the economic and political system and even revolution. That any of these risks materialized does not necessarily mean that property rights affected by such events can be deemed to have been taken."* In *Generation Ukraine*[31], the tribunal noted, *"the investment always entails risk. Nor is it sufficient for the disappointed investor to point to some governmental action or inaction, which might have contributed to his ill fortune. Yet again, it is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation."*

To sum up, it may be said that the investor cannot reasonably expect the Government to respect any subjective expectation that it retains. As a matter of fact, investment contracts are not insurance policy and do not insulate the investor from any potential future risks. This happens even when the investor wishes to get involved into a sector that is highly regulated or in areas where stringent and evolving local regulation has to be anticipated by the investor. Especially, in the domain of environmental law, where science is constantly progressing, investors cannot expect that the law will freeze at the moment when a large-scale economic project was agreed to.

2.2 State of Necessity as an Exemption from State Responsibility for Investments

Using James Crawford's terms,[32] there are six "justifications", "defenses" or "excuses" precluding the wrongfulness of conduct which would otherwise be a breach of an international obligation. These

[25] *Marvin Feldman v. Mexico,* ICSID Case No. ARB(AF)/99/1, Award (16 December 2002)
[26] Brownlie, I. *Public International Law*, Oxford University Press, 6th Edition, (2003) p. 509
[27] *Sedco v. National Iranian Oil Company*, IUSCTR Case No. 128, Interlocutory Award (17 September 1985)
[28] *Methanex Corporation v United States*, IIC 167, Final Award (19 August 2005)
[29] *Técnicas Medioambientales Tecmed SA v Mexico*, IIC 247, Award (29 May 2003)
[30] *Starrett Housing Corp v Iran*, Interlocutory Award No ITL 32-24-1 (19 December 1983)
[31] *Generation Ukraine*, Inc. v. Ukraine, ICSID Case No. ARB/00/9 (16 September 2003)
[32] J. Crawford, *The International Law Commission's Articles on State Responsibility, Intorduction, Text and Commentarie,* (2002), pp. 5-6

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circumstances are consent, countermeasures, force majeure and fortuitous event, distress, state of necessity and self-defense. In our case the State may invoke the state of necessity to justify its conducts.

The term 'state of necessity' is used by the International Law Commission to denote the situation of a state whose sole means of safeguarding an essential interest against a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another state.[33] The generally accepted requirements in Article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts elaborated by the ILC are the following:

(i) the measures taken are the only way for the state to safeguard an essential interest against a grave and imminent peril;

(ii) the act does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.[34]

The first condition that must be fulfilled is that necessity may only be invoked if it is the only way for the state to safeguard an essential interest against a grave and imminent peril.[35]

An essential interest of a state does not mean that the very "existence" of the state must be in danger. The next question is, logically, what interests shall be considered "essential". The ILC considered that it was pointless to try to identify or categorize these "essential" interests. They should be judged on a case by case basis.

According to the ILC, the term "imminent" is used in the sense of "proximate".[36] The threat to that essential interest "has to be extremely serious, representing a present danger to the threatened interest."[37]

The ICJ made a pronouncement on this requirement in the Gabčíkovo-Nagymaros case, asserting that the word "peril" evokes the idea of risk and that is what distinguishes "peril" from material damage. According to the ICJ, a state of necessity could not exist without a peril duly established at the relevant point in time; the mere apprehension of a possible peril is not enough. It also pointed out that the peril constituting the state of necessity must at the same time be "grave" and "imminent".[38]

In the present case there are several environmental risks that should be properly assessed by international independent experts. However, some common risks that have been recently argued and should be considered more thoroughly. To understand whether gold extraction from the Mine represents an imminent danger or not first let us try to understand what means of gold extraction are expected to be used by the Company.

First of all, any mountain is a living organism, which consists of various layers and contains all the elements of mend leaves periodic table. At Amulsar all chemical substances are hardened or, as scientists say, are dormant and safe, as long as there is a natural protective layer of the mountain with its vegetation. From the moment the protective layer of the mountain is disturbed it triggers irreversible chemical processes

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[33] Crawford, J., *The International Law Commission's Articles on State Responsibility* (2002) p. 96
[34] http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited 25 March, 2019)
[35] See footnote 52, p. 105
[36] See footnote 52, p. 202.
[37] See footnote 53
[38] Ryan Manton, *Necessity in International Law* (2016), p. 102

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just like the apple core is subjected to change when its protective layer is removed. The iron in the apple is oxidized and the apple changes its color. Various Amulsar substances allegedly will change their chemical composition from contact with air and water by forming new formations. Prior to removing the protective layer of Amulsar potential chemical formations and the danger they would pose for the environment should be scientifically assessed.[39]

According to the project the top layer of barren rocks weighting approximately 300 million tons will be removed first. The ore is crushed and graded in the crushing plant then transported to the cyanide heap leaching pad where point 7-8 grams of gold are extracted from each ton or 1 million grams of ore after leaching with cyanide solution. While the subsequent ore pile remains on the platform. There are many heavy radioactive and toxic metals in that pile.

Secondly, according to the experts cyanide heap-leaching technology will be used in Armenia for the first time and the seismic resistance of this platform is one of the most important concerns. The region is seismoactive. The upper threshold of the possible earthquake has been estimated as 7.2 magnitude. Increasing or decreasing of one tenth of the magnitude results in a ten-time difference in the construction cost. If the predicted earthquake occurs in the region this dangerous plant with its chemicals will come into contact with Arpa River and will greatly damage the environment. There are many cases of goldmine exploitation and gold extraction through cyanide heap leaching in the world. Among the most important is the case of Costa Rica where eventually the mine was closed and the government had to spend enormous sums to recover the damages.[40]

The approach of the international experts is that the acid drainage should be avoided at mine planning stage rather than following the mine opening and then trying to solve the problem. Otherwise, the government will have to spend tremendous amounts of money for centuries to get rid of the consequences which will be several times exceeding the amount earned from the extracted minerals.

Thirdly, experts claim that acid water will actively dissolve heavy metals present in the rock, which are many in the Mine, including those of first class of toxicity – mercury, lead, arsenic and so on. As a result, a high density leachate of high acidity, heavy metal ions is formed, which mixing with the water of Vorotan and Arpa rivers, will affect the quality of water.[41]

Moreover, it is assumed by the experts that part of the contaminated groundwater will immediately impact the Spandaryan-Kechut tunnel, destroying the concrete and the metal parts. As a result collapses will occur. Even the damaged tunnel will be a drainage path through which the acidic and toxic waters will penetrate Kechut reservoir (5 million m^3 / year and more).

In addition, experts have expressed the view that it will be impossible to transport additional water to Lake Sevan without serious damage to the ecosystem of the lake and the loss of water quality.

[39] https://www.youtube.com/watch?v=LWhbwVIvhq8 (last visited Feb. 11, 2019)
[40] https://www.youtube.com/watch?v=LWhbwVIvhq8 (last visited Feb. 11, 2019).
[41] http://www.armecofront.net/en/amulsar-2/acid-mine-drainage-in-amulsar-and-its-hazard%E2%80%A4-professor-armen-saghatelyan/ (last visited March 22, 2019)

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Contaminated water outflow from the mine site will cause serious problems in the irrigated agricultural fields, particularly the vineyards, in the Vorotan and Arpa rivers.[42]

As a result of mine exploitation, experts claim that mercury and carbon dioxide will be emitted into the environment, which will break Armenia's obligations undertaken by international conventions (Climate Protection, Minamata).[43]

Hence, alternatively, if State's actions were claimed to be qualified as international wrongful acts, the State may invoke the state of necessity as an exemption from State Responsibility for Investments because of the imminent environmental and public health hazards that may be cause by the mine exploitation.

2.3 Unclean Hands and the Inadmissibility of Claims by Investors

Many tribunals have concluded that they lacked jurisdiction over a claim (or that it was inadmissible) because an investor had made its investment in violation of the host State's laws. The legality requirement is usually considered to be a manifestation of the clean hands doctrine. A number of investment tribunals have. in fact, already applied the clean hands doctrine in their awards to bar the admissibility of claims. [44] The "clean hands" doctrine has been defined as *"an important principle of international law that has to be taken into account whenever there is evidence that an applicant State has not acted in good faith and that it has come to court with unclean hands."* It originated from the general principle of good faith. In the context of state responsibility, the ILC Special Rapporteur James Crawford explained that "if it exists at all," the doctrine would operate as a ground of inadmissibility.[45]

As explained by the *Hamester* tribunal: *"An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law".*[46]

In the present case, the Canada-Armenia BIT does not contain any explicit legality requirement clause. In the *Phoenix v. Czech Republic* case, the Tribunal affirmed that the obligation for investors to make their investments in accordance with the host State's law is implicit even when not expressly stated in the relevant BIT.[47] This is indeed the position which has been adopted by several other tribunals:

[42] https://www.lragir.am/en/2017/12/21/37798 (last visited March 25, 2019)
[43]http://www.mercuryconvention.org/Portals/11/documents/conventionText/Minamata%20Convention%20on%20Mercury_e.pdf (last visited March 25, 2019)
[44] Dumberry, P., *State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the* Yukos *Award, in The Journal of World Investment & Trade* (2016), p. 59
[45]https://www.researchgate.net/publication/327318458_The_Doctrine_of_'Clean_Hands'_and_the_Inadmissibility_of_Claims_by_Investors_Breaching_International_Human_Rights_Law_in_Ursula_Kriebaum_ed_Transnational_Dispute_Management_Special_Issue_Aligning_Huma (last visited March 25, 2019)
[46] *Gustav F W* Hamester *GmbH & Co KG* v. *Republic of* Ghana, ICSID Case No. ARB/07/24 (18 Jun 2010)
[47] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5 ()

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Hamester,[48] *Yaung Chi Oo,*[49] *Fraport II*,[50]and *SAUR*.[51] The same position has also been adopted by many scholars.[52]

It may be claimed that the investment has been made in violation of laws of the Republic of Armenia. Particularly, the Article 10 (2) (c) of the Law on Lake Sevan[53] clearly states that ore processing is prohibited if it is organized in the immediate area of impact of the lake basin. However, the Government Decree N 746 of 2013 amended the draft of the territorial plan for the catchment basin of Lake Sevan, which had been operating for ten years.[54]

In 2014, it was discovered that the Potentilla porphyrantha plant listed in Armenia's red book of endangered species grew in the Amulsar mine exploitation zone. In the same year the Government has adopted a Decree N781 allowing the red book flora species to be uprooted from their native habitat and replanted elsewhere.[55] There is s prohibition which bars carrying out activities that lead to habitat degradation. In 2015, Decree N 244 the government decides to alter the permissible limits of surface mines haulage road slope.[56]

In *Inceysa v. El Salvador*, the Tribunal held that *"because the investor obtained its investment through fraud, the investor could not seek relief for alleged harm to that investment under* either the governing IIA or the contract".[57]

In *World Duty Free* case, the Tribunal held "the Claimant had in fact procured the 1989 Agreement through a bribe to the former Kenyan President and that, consequently, the Claimant had no right to pursue or recover under any of its pleaded claims, all of which arose from that 1989 Agreement".[58] *World Duty Free* is further notable in that it signals that foreign investors not only have *rights* in the countries where they invest, but also *obligations*; it similarly illustrates that foreign investors' enjoyment of their rights may be contingent on the investors' compliance with their obligations. Together, *World Duty Free* and *Inceysa* may therefore support a growing recognition and significance of foreign investors' duties to comply with national and/or international law relating to their investments.[59]

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[48] See footnote 69
[49] *Yaung Chi Oo Trading Trading Pte Ltd v Myanmar*, ASEAN Case No ARB/01/01 (31 March 2003)
[50] *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID No ARB/11/12, Award (10 December 2014)
[51] *SAUR International v Argentina*, ICSID Case No ARB/04/4 (6 June 2012)
[52] Moloo and Khachaturian (n 9) 1475; Bjorklund and Vanhonnaeker (n 9) 370; Llamzon and Sinclair (n 3) 508; Schill (n 11) 313.
[53] Հայաստանի իրավական տեղեկատվական համակարգ, ՀՀ օրենքը «Սևանա լճի մասին», <http://www.arlis.am>
[54] «Հայաստանի Հանրապետության Կառավարության 2003 թվականի դեկտեմբերի 11-Ի N 1787-Ն որոշման մեջ փոփոխություն կատարելու մասին» ՀՀ կառավարության՝ 18 հուլիսի 2013 թվականի որոշում N 746-Ն, <https://www.arlis.am/DocumentView.aspx?docid=84485>
[55] «Հայաստանի Հանրապետության բուսական աշխարհի օբյեկտների պահպանության և բնական պայմաններում վերարտադրության նպատակով դրանց օգտագործման կարգը սահմանելու մասին» ՀՀ կառավարության՝ 31 հուլիսի 2014 թվականի, N 781-Ն որոշում, <https://www.arlis.am/documentview.aspx?docID=91830>
[56] «ՀՀ կառավարության 2010 թվականի հունվարի 21-ի N 51-Ն որոշման մեջ փոփոխություններ կատարելու մասին» ՀՀ կառավարության՝ 10 մարտի 2015 թվականի N 244-Ն որոշում <https://www.arlis.am/DocumentView.aspx?docid=96350>
[57] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (2 August 2006).
[58] *World Duty Free Co Ltd v. The Republic of Kenya*, ICSID Case No. ARB/00/7 (Sep. 25, 2006)
[59]https://www.iisd.org/itn/2018/10/18/world-duty-free-v-kenya

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Hence, Armenia should be very careful in arguing that the Company has violated the “clean hands”’ doctrine and in putting the legality of investment under question. Unless it can be proved that the change in legislation was due to an act of corruption in which the investor was involved (which would be extremely difficult, if not impossible to prove) the investor cannot be penalized for the “unclean hands” of someone else. However, in case Armenian authorities succeed to bring relevant and sufficient evidences substantiating a claim of “unclean hands”, it could have great impact on the Tribunal’s assessment of the State’s liability and damages.

Summing up the possible defense mechanisms for the State, here are some of the Strong arguments of the State:

- There was no prime facie expropriation of the Company’s investment as the State neither has terminated nor seized the license of the Company nor has taken any actions to interfere with the ongoing business operations.
- The State’s regulatory actions can be justified under the famous police power doctrine as the state has sovereign right to regulate the economic activities in its territory, proceeding from public interest and guided by public purpose.
- Alternatively, relevant actions (if any) may be justified based on the principle of necessity, for public interest, such as public health and protection of environment.

There are, however, some weaknesses in the arguments that may be put forward by the State which could be summarized as follows:

- The State has allegedly violated fair and equitable treatment standard. The obligation to accord fair and equitable treatment appears in the great majority of international investment agreements. Among the protection elements of the international investment agreements, the standard has gained particular prominence, as it has been regularly invoked by claimants in investor-State dispute settlement proceedings, with a considerable rate of success.
- The State has not exercised its positive obligations in order to ensure *full protection and security* of the Company’s investments, as the blockades, however continued and physically interfered the employees of the Company to enter their workplace:
- Inaction or implicit neglect of the State may be viewed as act tantamount to *expropriation* or other equivalent (indirect expropriation), which even if considered lawful, must afford just adequate compensation to the Company.
- The argument on “police power” is weak. The “police power” can be invoked only if a positive action (as opposed to inaction) of the government was the cause of action not in our case where we are effectively dealing with a case of “inaction” (rather than positive action) of the government which could be held to imply approval.

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