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How to handle “political issues” in international arbitration?

1. Good afternoon, dear colleagues! I would like to thank the organizers for the kind invitation. It is a pleasure for me to address this excellent audience, and I hope that my today’s speech will not preclude organizers from inviting me again.
2. Undoubtedly, in recent years international arbitration, including investment arbitration, has been attracting more and more attention. There are many reasons for that, including the fact that the number of high-profile cases handled by the tribunals, **is increasing**. Arbitration is continuously viewed as the only effective alternative option to the state courts. However, there is a clear understanding that existing arbitration mechanisms **are not ideal**.
3. Albert Einstein once said that: “We cannot solve our problems with the same thinking we used when we created them”. I sincerely hope that today’s event is the step forward to fresh and pragmatic solutions of the problems, we all are facing.
4. You all perfectly know the current hot topics in international arbitration: UNCITRAL’s efforts to reform investment arbitration, development of expedited procedures in commercial arbitration, usage of new technologies, on-line arbitration, third-party funding, etc.
5. However, I would like to focus today on a topic that may seem not so modern, but **remains always trendy and relevant**. It is the application of the **political issue doctrine** in arbitration. In general, this doctrine should answer the simple question: whether an arbitral tribunal is authorized to decide on private claims that involve or assume determination of national or international **political questions**?
6. The political issue doctrine first appeared hundreds of years ago in common law countries, and was developed in the US Supreme Court jurisprudence. The political nature leads to the extraction of such issues from the court competence. This approach is rooted in both constitutional and **prudential** considerations and evinces respect for the separation of powers, including the “properly limited role of the courts in a democratic society”. According to “political question” doctrine courts will not adjudicate certain controversies because their resolution is more proper within the **political** branches: executive or legislative.

7. Political question doctrine goes hand-in-hand with the literal interpretation of the legal texts by the judges. It could be explained by the words of the recent nominee to the US Supreme Court Professor Amy Barret, who, following the views of the famous US Supreme Court Judge Scalia, adhered to the so-called textualism and originalism.
8. She said: «A judge must apply the law as written. Judges are not policymakers, and they must be resolute in setting aside any policy views they may hold». She also said «The constitution's meaning is fixed until lawfully changed; the court must stick with the original public meaning of the text even if it rules out of the preference of a current majority».
9. These words are also very much true for the sphere of international dispute resolution now, since **political cases** are becoming the subject matter in **international investment dispute** frequently.
10. Companies and individuals under the veil of investor's claims try to push international arbitrators to express their position – explicitly or implicitly – on issues that are at the exclusive **sovereign discretion** of national governments and parliaments.
11. Examples of such political cases are well known. They include claims brought by Philip Morris against Uruguay and Australia due to national anti-tobacco regulations, and others cases.
12. In many “political” cases, arbitrators could be tempted to express loudly their personal positions on the issues of public interest: tax or monetary policies, ecology, energy, public health, cybersecurity, etc. It could be the illusion that attractive liberal approach to interpretation of the international treaties may lead to good decisions, and consequently strengthen reputation of the particular arbitrator and arbitration in general.
13. **It is not true.** Any decision, where the arbitrator tries **not to apply the law as it is**, but to interpret that in a way, which, from his or her subjective standpoint will make our world better, have an **opposite effect**.
14. There are at least two reasons for this **pessimistic statement**. First - is the objective **inability** of the arbitration to consider all social, economic, political, technical and other factors underlying the serious policymaking decisions.
15. Do you know any state, where parliament consists of just three people, who review the laws and policies? **I do not**. Do we seriously think that three private arbitrators, even being prominent professors or practitioners, may replace hundreds of members of the parliament, clerks in governmental agencies, scientific institutions and intelligence services? Clearly, not, and the risk of mistake **is huge**.
16. The second reason is that any policy is not **straightforward**, it has **multiple** effects. If you order billion compensation from the state budget to the private company, trying **to sanction** the government, be sure that millions of citizens will suffer from that. This decision will have the effect of the further **inequality** and social unrest.

17. This leads to the **destructive** consequences. The arbitral awards stay **unexecuted**, the arbitration is criticized for impartiality and «politization», states try to restore the balance with available tools and **in response** are blamed for the allegedly not respecting of international law. This battle **radicalizes** both sides: governments react sharply which forces arbitrations to pass more and more **frivolous** decisions, expanding their jurisdiction and thus sabotaging the initial meaning and purpose of the treaties, they apply. And no one can **benefit from this**.
18. Application of international treaties with regard to the territories with disputed international status could be a good example. Almost twenty years ago the European Court of Human Rights tried to ensure the rights of people in Northern Cyprus and invented the concept of “**effective extraterritorial control**” to modify the clear wording of the European Convention, which provides for the strict **territorial** application. This concept was again used in the so-called Transdniestrian cases. However, we now see that these decisions of the European Court of Human Rights have not contributed to the **resolving political situations** in the areas concerned, **failed** to help a single person or family, have only strengthened political tension and annoyance. These decisions also have affected negatively the Court’s reputation.
19. Nevertheless, we again witness an attempt to apply the “effective control” concept in the Crimean **investment arbitration** cases. In those cases Ukrainian claimants insist that their property was illegally expropriated, that Crimea is under Russian control, that they have an international legal remedy despite the fact that in time of investment Crimea was the Ukrainian territory and claimants were **domestic** investors. This position is supported by some academic papers and articles.
20. Just to remind, these arbitration proceedings were initiated by the Ukrainian companies against Russia with a reference to the Russian-Ukrainian BIT of 1998. As any other standard BIT, Russian-Ukrainian treaty protects investments "which are made by an investor of one Contracting Party in the territory **of the other** Contracting Party in accordance with its laws".
21. Thus, in order to understand, whether investments made in the territory of Crimea will be **foreign**, and therefore protected, one must first determine whose **sovereign territory** the Crimean Peninsula is.
22. Since Russia and Ukraine are not in consensus regarding the status of the territory, an investment tribunal **cannot resolve** such dispute either. This is clearly a diplomatic **political** question between Russia and Ukraine. The consent of Ukraine and Russia to arbitrate disputes expressed in the BIT **is limited** to disputes arising "in connection with investments". State consent therefore does not encompass the **territorial sovereignty** disputes.
23. The tribunals have a ground for refusing the claims - the **inability** to consider the political issue over the statehood of the territory. This argument is of paramount importance. It is a question of judicial **prudence** and **accuracy**.

24. The **ability** of international tribunals **in deciding political issues is limited** given the procedures they use, the status of arbitrators, the standard for evaluating evidence and other objective factors.
25. Traditionally, political question concept was about the separation of powers as the element of the democratic lawmaking and law enforcement.
26. Arbitrators and judges should not interfere with matters that require a **special level of legitimacy**, for example approval by the national legislators. That was the case in **Yukos** proceedings. There the investment tribunal tried to acknowledge the legal force of the arbitration clause in the **Energy Charter Treaty**. However, it **disregarded** the fact that this treaty had been **never ratified** and, therefore, had not received legalization from the national parliament. Russian legislators had **never consented** on the **exclusion** of the state courts' **constitutional** jurisdiction to assess the sovereign tax measures of the domestic authorities.
27. The political issue doctrine **is not specific** for Russian cases. It is a **global issue**, which will influence **dramatically** the future of international dispute resolution mechanisms worldwide, **both private and public**. May be **more** than penetration of new technologies, third-party funding or even consequences of COVID-19.
28. **To be fair**, this is a challenge not only for international **arbitration**. Political issues also evolve the collision between the national and supranational courts. The latter cannot ignore constitutional and **democratic** dimensions of state policy **anymore**. The recent landmark decision of the German Federal Constitutional Court protecting Bundestag **sovereignty** and ruling against the European Court of Justice opinion on the ECB monetary measures, is the example of this global trend.
29. To deal with this challenge we should have clear legal tests and guidelines for the parties and arbitrators:
- a. how they should identify "political" questions,
 - b. how they should deal with them,
 - c. what is the burden and standard of proof in such cases,
 - d. when the arbitrators should refuse the jurisdiction and demonstrate the **judicial modesty**.
30. I could bring an analogy here: as we all know, in football there are usually twenty-two players and only one main referee on the field. The key asset of referee is neutrality. So, if referee wants to see his name among the forwards in tabloids, he should come to the stadium not to arbitrate, but rather to play, then he is not a referee anymore, but **one more player**. However, any game needs clear rules and trusted referees to ensure the fair play. Otherwise, this game has no future.
31. Thank you for your attention! And we have some time for answering questions.