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主 論 文 の 要 旨

論文題目 A FUNCTIONAL ANALYSIS OF PUBLIC INTEREST IN
INTERNATIONAL INVESTMENT LAW AND ARBITRATION

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論 文 内 容 の 要 旨

Even though there is an observable growth in number of international investment disputes involving public interest concerns, the current landscape of arbitral jurisprudence as well as scholarship on the matter lead to a theoretical and practical confusion. This confusion to a large extent stems from the fact that even though public interest concerns in investment disputes appear in different factual and legal contexts and at different stages of investment disputes, these circumstances are not always addressed in practice. As a result, notwithstanding the abundance of literature and arbitral jurisprudence on the issue, the relationship between the state right to regulate in the public interest and state international obligations towards foreign investors, including protections against uncompensated expropriation, is still uncertain.

In general states raise public interest arguments to avoid international liability for encroaching on the property of foreign investors or to mitigate the potential financial consequences of such actions. In particular states raise public interest concerns in an attempt to exclude certain regulatory measures from the definition of an indirect expropriation or justify the legality of expropriation of foreign property. States refer also to public interest as a means to mitigate the amount of damages which arise due to the established internationally wrongful conduct towards foreign investors. The confusing

application of public interest concerns in investment disputes stems from the fact that both arbitral tribunals and scholars, while referring to the term and its impact on the merits of a case, often do not emphasize the wider context of their argumentation or specific factual background of the case.

The increasing sophistication of investment disputes and visible pressure on inclusion of public interest concerns in the system, without development of a comprehensive approach towards this notion, risks destabilization of the existing system of adjudicating investment disputes. There are several reasons for this potential destabilization. Firstly, international investment jurisprudence has so far failed to comprehensively elaborate on the multiplicity of contexts in which public interest arguments arise in investment disputes, and their potential impact on the ultimate outcome of such disputes. Secondly, neither investment treaties nor arbitral tribunals provide sufficient guidance on where to seek sources of norms which stand behind public interest arguments. Thirdly, there is uncertainty whether the determination of the content of norms behind public interest depend upon each and every state, or whether such a content has a more universal meaning.

Under the general framework of classical international law, states retain an almost unlimited power of defining and applying the notion of public interest according to their will. As long as this issue is of a limited significance in the domestic law context, its potential consequences in international law are critical. This situation risks the potential abuse of public interest arguments in investment disputes to the state's favor and to the detriment of international investment protection. If agreed that states could pursue their domestically defined public interests in exclusion of their international commitments, then the system risks complete eradication of its underlying premises to safeguard foreign investments from the abuse of state's power. This problem is especially vivid when viewed from the global perspective. Bearing in mind that today almost 200 states participate in international investment flows, their possibly conflicting domestically defined public interests could bring unpredictability and arbitrariness to international economic relations, potentially wiping out the

milestone developments of the latter part of the twentieth century.

Both social scientists and legal academics have attempted to clarify the notion of public interest. Even though the discussion among social scientists sheds some light on understanding the potential meaning of the public interest, there are still issues to be clarified with regard to the different contexts in which the concept appears in international investment law and arbitration. The discussion in social sciences suggests that public interest might have many meanings depending on context and the particular discussion in which it has been employed to justify certain state actions. The reason is that both constitutive elements of the notion, namely “the public” and “an interest” might indeed mean something different under different circumstances. This issue is especially salient when academics and arbitral jurisprudence discuss public interest concerns in domestic and international law contexts.

Public interest concerns appear in a number of circumstances and at different stages of investment disputes. In general however, the discussion to a large extent focuses on considerations over states’ right to regulate. Public interest concerns appear in international investment disputes at least in three contexts concerning the relationship between: 1) public interest and indirect expropriation; 2) public interest and compensation; and ultimately 3) public interest and damages. The growing number of arbitral awards, and academic scholarship concerning the matter, makes the picture rather inconsistent as to the relationship between the public interest and the three indicated issues. There is also an uncertainty as to whether public interest in all these contexts actually means the same thing. What is uncertain is whether the notion of public interest is static or whether its nature is rather dynamic, and the notion’s content potentially changes depending on the context.

This dissertation proposes a functional analytical tool to investigate the different contexts in which public interest concerns appear in investment disputes in order to clarify the content and the scope of application of the notion. The research is based on the premise that currently the notion plays at least three distinctive model functions as: 1) an exclusion; 2) a condition; and 3) a mitigation

measure. The First Model Function relies on the application of the police powers doctrine and is based on the premise that state non-discriminatory *bona fide* regulatory measures in the public interest should be excluded from the definition of an indirect expropriation. The Second Model Function focuses on public interest as one of conditions for legality of an expropriation. The Third Model Function relies on public interest concerns as mitigation measures for state internationally wrongful acts, aimed at excluding or limiting state duty to pay damages for such actions. There is a cause-effect relationship between the three model functions and the possibility of invoking public interest arguments in a certain function depends on the stage of an investment dispute. The hierarchical structure of public interest arguments makes states to invoke public interest concerns in the First Model Function in an attempt to preclude indirect expropriation, which could either lead to dismissal of the case, or its further continuance of the tribunal's reasoning. Then states invoke public interest concerns in the Second Model Function in order to confirm legality of expropriation. States could raise public interest arguments in the Third Model Function with a focus on mitigating the duty to pay damages to foreign investors only upon failure to prove legality of an expropriation.

The research analyses the developments of international investment law as well as the current arbitral practice through the lens of the functional approach presented above. The historical analysis demonstrates that the events of nationalizations and expropriations of private property during decolonization and the emergence of post-colonial states, led to integration of public interest concerns to international investment law. In particular public interest has become a part of the standard of expropriation, serving as one of the conditions for its legality. Further integration of public interest concerns with international investment law appeared as a response to the perceived legitimacy crisis of ISDS. This crisis was caused by the overall dissatisfaction with adverse impact of operations foreign investments in developing countries as well as a growing number of investment disputes touching upon state regulatory measures. One of the outcomes of this debate was an attempt to integrate public

interest considerations within the scheme of ISDS in the form of excluding certain state regulatory measures from the definition of an indirect expropriation.

The analysis of international customary law demonstrate that as long as public interest concerns as condition for legality of an expropriation constitute a norm of customary international law, the other two functions of public interest have not reached a similar status. Some of the commentators advocate for the existence of norms of international customary law concerning application of police powers doctrine as a means to exclude state regulatory measures in the public interest from the definition of an indirect expropriation. However, states' practice does not reflect any consistent manner in application of police powers doctrine to investment disputes. The research demonstrates that despite the generally accepted need of integrating public interest concerns into the process of deciding investment disputes related to indirect expropriation, the ideas on how to precisely do it have significantly differed in practice. The proposals on how to integrate public interest concerns in the field ranged from preclusion of wrongfulness, through release from liability for a wrongful act or release from a duty to pay compensation in case of established liability, into ultimately excluding certain state regulatory measures from the definition of an indirect expropriation. Only recently it seems that the solution adopted by majority of international arbitral tribunals as well as states in their recent treaty practice focused on integrating police powers doctrine in the form of excluding certain public interest motivated state measures from the definition of an indirect expropriation. The negotiation process of some of the recently signed international investment treaties, proved however, that states still have diverging views on the precise threshold of applying police powers doctrine in this function.

The research finds that the choices made by international community with regard to integration of public interest concerns in the field might not be the most desirable ones, as often they lead to "all-or-nothing" results, practically dispossessing foreign investors of the possibility to recover losses, in case where public interest concerns cause inapplicability of the notion of an indirect expropriation.

The “all-or-nothing” result is caused by the very nature of a test for establishment of an indirect expropriation, which allows for only two ultimate outcomes, either find indirect expropriation and award full compensation or find that there has been no expropriation and dismiss the case on this ground without awarding any compensation. Such an exercise lead to the “winner takes all” results, and does not allow for sufficient considerations and balancing of state obligations to protect foreign investments with state regulatory measures in the public interest.

With regard to public interest concerns as means to mitigate damages for an internationally wrongful act, the analysis explored the standard of damages provided in international customary law and reflected in *Factory at Chorzów*. The analysis of the judgement of the arbitral tribunal in the case demonstrated a number of differences between the factual and legal background involved in that very dispute and the current investment disputes over state regulatory powers. These differences concerning legal and factual backgrounds provide for the possible basis of departure from the standard as reflected in the *Factory at Chorzów* in situations, where investment disputes require arbitral tribunals to address public interest concerns in deciding upon damages.

One of the research findings is also that so far integration of public interest concerns at the level of awarding compensation for state internationally wrongful acts have been rather unexplored. The reasons for such a scarcity of academic analysis and limited sources of arbitral jurisprudence are indeed the choices made by the international community, as reflected above, which focused on public interest concerns at the early stage of arbitral proceedings concerning establishment of an indirect expropriation. This as a result made a great number of cases involving allegations of an indirect expropriation, actually never reach the quantum phase of a dispute, hence precluding possibility of discussing public interest concerns at the level of awarding damages. However, the research demonstrates that the applied and widely accepted standard of damages reflected in the *Factory at Chorzów case* is potentially susceptible of integrating public interest concerns into the tribunal’s

decision-making process. Integration of public interest concerns at the quantum phase of investment disputes could lead to more balanced and proportional results in cases involving state regulatory measures in the public interest. As such the research suggests, that indeed it would be more desirable to integrate the police powers doctrine concerning certain state's regulatory measures in the public interest, at the level of deciding damages, where the tribunal even though finding such measures potentially wrongful, could ultimately excuse or mitigate financial liability for such measures under international law. This solution would lead to stability and predictability of international investment protection, but at the same time would leave certain discretion to arbitral tribunals to decide about state liability bearing in mind all important legal and factual circumstances of a particular case.

The research investigates a number of international investment disputes involving public interest concerns related to environmental and health protection. The analysis of case law demonstrates that the relationship between the notion and issues of expropriation and the duty to compensation differs depending on a number of variables, which determine possibility of employing public interest arguments in the three model functions: 1) stage of proceedings; 2) roots of state measures; and 3) particular wording of the law applicable to the dispute. The dissertation addressed the issue of whether the two components of the notion, namely "the public" and "an interest", would be similar in all functions which the notion performs in the system and if not, then what would they ultimately mean under any of the three model functions. In this context, the research investigated all three functions of the notion of public interest and concluded that even though the definition and the scope of application of the notion should depend on the particular function performed in the system, these nuances has not been properly addressed in practice.