INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LSF-KEB HOLDINGS SCA
AND OTHERS

Claimants

v.

REPUBLIC OF KOREA

Respondent

ICSID Case No. ARB/12/37

PROCEDURAL ORDER NO. 15

DECISION ON MINBYUN'S NON-DISPUTING PARTY APPLICATION

Members of the Tribunal

Mr. V.V. Veeder, President
Judge Charles N. Brower, Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms. Geraldine R. Fischer

21 December 2015

I. PROCEDURAL BACKGROUND

1. By letters dated 7 May 2015, 2 June 2015 and 16 November 2015, the Members of the International Trade Committee of 'MINBYUN' - Lawyers for a Democratic Society ("MINBYUN") requested permission to attend Phase I, Phase II and Phase III of the oral procedure in this arbitration, pursuant to ICSID Arbitration Rule 32(2). Upon the Tribunal consulting the Parties, the Parties stated their objections to the presence of third persons at the Hearing. Accordingly, the Tribunal could not accept MINBYUN's request under Rule 32(2) and so informed MINBYUN.

2. On 30 November 2015, MINBYUN submitted a "Request for an *Amicus Curiae* Written Submission as Non-disputing Party" according to ICSID Arbitration Rule 37(2) (here called the "Application"). That same day, the Secretariat transmitted a copy of the Application to the Tribunal and the Parties. Pursuant to Rule 37(2) requiring consultation with the Parties, the Tribunal invited the Parties to submit their respective observations on MINBYUN's Application. The Parties submitted such observations in their respective written submissions of 11 December 2015.

II. MINBYUN'S APPLICATION

3. In its Application, MINBYUN submitted that its "written [substantive] submission will bring particular knowledge and insight that are different from those of the disputing parties regarding factual or legal issues related to this Case proceeding within the scope of this Case."[1]

4. In brief, MINBYUN relied principally on two arguments, specifically contending that: (1) LSF-KEB Holdings SCA did not comply with "the requirement that investments be made in compliance with laws and regulations of host state" as its investment in the "Korean Exchange Bank was not made in compliance with the Banking Act … [regulating a] 'non-financial

[1] MINBYUN Application, p. 1.

business operator' [('NFBO')]"; and (2) "the Claimant failed to waive the rights to initiate any local proceedings under Article 8.2 of the Belgium-Luxembourg-Korea BIT."[2] It is appropriate to set out more specifically the principal grounds for MINBYUN's Application, as regards these two arguments.

5. First Argument: "… as the tribunals at the *Salini v. Kingdom of Morocco* (ARB/00/4), *Tokios Tokeles v. Republic of Ukraine* (ARB/02/18), and *Inceysa v. Republic of El Salvador* (ARB/03/26) rule, the requirement that investments be made in compliance with laws and regulations of host state is a common requirement in modern BITs including the Belgium-Luxembourg-Korea BIT of this Case. However, the investment of the claimant LSF-KEB Holdings SCA (hereinafter 'the Claimant') for 64.62 percent of the stocks of the Korean Exchange Bank was not made in compliance with the Banking Act of the Republic of Korea (hereinafter 'the Act') which stipulates that 'non-financial business operator' may not hold more than four (4) percent of the total number of issued voting stocks of a bank (Article 16(2) of the Act). In order to comply with the Article 16(2) of the Act, the Claimant should have submitted the total gross capital records of all 'specially related persons' including those that are classified as non-financial companies within the definition of Article 2(1)-1 of the Act to the Financial Services Commission (hereinafter referred to as 'the FSC') of the Republic of Korea that has regulatory power to review and determine whether the Claimant fell within the definition of non-financial business operator or not. Nonetheless, the Claimant did not report the records of some of the specially related persons that are non-financial companies, including 'KC Holdings, SA', 'Star Holdings, SA' and 'U.S. Restaurant Properties, Inc.' in order to avoid being determined as a non-financial business operator by the FSC. In sum, the investment of the Claimant violated the Article 16(2) of the Act, hence did not satisfy the requirement the Belgium-Luxembourg-Korea BIT of this Case. The endorsements by the Korean Government shall not be deemed to have cured the violation or estopped the Korean

[2] MINBYUN Application, pp. 1-2.

Government as indicated in the paragraph 387 of *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ARB/03/25) …"

6. Second Argument: "… regarding the argument against Korean Government's tax measure, the Claimant failed to waive the rights to initiate any local proceedings under the Article 8.2 of the Belgium-Luxembourg - Korea BIT. As the attached notarized record of the Korean Supreme Court (www.scourt.go.kr) shows, the Claimant filed a local remedy law-suit against the argued tax measure of the Korean Government on November 23, 2012 (Case No. 2012-Guhap-39544 Korean Seoul Administrative Court), appealed on December 29, 2014 (Case No. 2014-Nu-74178 Korean Seoul High Court) and made a final appeal to the Korean Supreme Court on October 28, 2015 (Case No. 2015-Du-55134 Korean Supreme Court) ..."

7. MINBYUN further contended that it, "as a lawyers' NGO in a Special Consultative Status in [the] United Nations, has a significant interest in this Case in terms of the rule of law and harmony in the power of the Korean court and international arbitration tribunal."[3]

III. SUMMARY OF THE DISPUTING PARTIES' SUBMISSIONS

8. *The Claimants:* In brief, by their written submissions of 11 December 2015, the Claimants contend that MINBYUN's Application should be denied by the Tribunal on the ground that all the factors listed in ICSID Arbitration Rule 37(2) weigh "strongly *against* the acceptance of MINBYUN's proposed submission". The Claimant invokes four particular factors.

9. *Factor 1*: According to the Claimants, MINBYUN's submission will not assist the Tribunal in the Determination of a Factual or Legal Issue Through Unique Knowledge or Insight (ICSID Arbitration Rule 37(2)(a)).

10. The Claimants contend that MINBYUN has not demonstrated "any knowledge, experience, or expertise with respect to the banking industry, the banking laws of Korea, the tax laws of

[3] MINBYUN Application, p. 2.

Korea, or international banking or tax law, or even the BIT itself…."[4] Additionally, "Respondent's counsel already addressed the two issues that MINBYUN hopes to discuss in its *amicus* submission."[5] Specifically, the Respondent has already argued Claimants' alleged failure to waive certain rights to local remedies whereas MINBYUN's Banking Law argument was apparently considered and rejected by Respondent's counsel.[6] Moreover, it would be inappropriate to revisit the specific Banking Law issue as MINBYUN has not indicated any expertise in this area (and less so any indication that it has more knowledge on this topic than the Korean Government, counsel for Korea, or the Korean banking law experts).[7] Furthermore, as the NFBO Banking Law issue has not been briefed, assembling new factual evidence and supplementary expert testimony would be burdensome shortly before the final hearing.[8]

11. *Factor 2:* According to the Claimants, MINBYUN would address matters outside the scope of the dispute (ICSID Arbitration Rule 37(2)(b)).

12. The Claimants contend that the Parties agree that LSF-KEB's NFBO status is not a jurisdictional issue, so such status is not a matter in dispute between the Parties.[9] Although the waiver issue is in dispute between the Parties, MINBYUN has no expertise to offer to the Tribunal on this matter.[10]

13. *Factor 3*: According to the Claimants, MINBYUN has no significant interest in these proceedings (ICSID Arbitration Rule 37(2)(c)).

14. The Claimants contend that MINBYUN's "interest" in the case, which MINBYUN asserts is "significant…in terms of the rule of law and harmony in the power of the Korean court and international arbitration tribunal," "is common to *all* Korean citizens" and arguably "every

[4] Claimants' 11 December 2015 Letter, p. 5.
[5] Claimants' 11 December 2015 Letter, p. 5.
[6] Claimants' 11 December 2015 Letter, p. 5.
[7] Claimants' 11 December 2015 Letter, p. 6.
[8] Claimants' 11 December 2015 Letter, p. 6.
[9] Claimants' 11 December 2015 Letter, p. 6.
[10] Claimants' 11 December 2015 Letter, p. 7.

person in the world has an interest in the rule of law."[11] The Claimants emphasise that such "broad and generalized interests … are not sufficient to justify an *amicus* submission."[12] Likewise, "MINBYUN never explains how the Tribunal's potential ruling on either point that it proposes to address will impact 'the rule of law' or any other cause it claims to champion."[13]

15. *Factor 4:* According to the Claimants, the admission of MINBYUN's *amicus* submission would impose a substantial burden on the Parties (ICSID Arbitration Rule 37(2), last paragraph).

16. The Claimants contend that the Parties' dispute has been the subject of "extensive media attention in Korea for several years, and MINBYUN in particular has been aware of it since at least July 2012."[14] MINBYUN has submitted its Application a little over a month before the final phase of the Hearing and asking the Parties to respond to an "*amicus* submission at this late hour would, in the words of Rule 37(2), be disruptive, unduly burdensome, and unfairly prejudicial."[15]

17. Accordingly, as understood by the Tribunal, the Claimants oppose MINBYUN's Application.

18. *The Respondent:* In brief, by its submissions of 11 December 2015, the Respondent makes two principal submissions in response to MINBYUN's Application, although also stating that it is generally "not opposed as a matter of principle to consideration of this Tribunal of all relevant arguments and issues".[16]

19. First, the Respondent contends that it (the Respondent) "has diligently investigated and advanced in these proceedings all defences to Claimants' claims that, in the considered view of its counsel, are meritorious in light of existing investment treaty jurisprudence and the facts

[11] Claimants' 11 December 2015 Letter, p. 7.
[12] Claimants' 11 December 2015 Letter, p. 7.
[13] Claimants' 11 December 2015 Letter, p. 7.
[14] Claimants' 11 December 2015 Letter, p. 7.
[15] Claimants' 11 December 2015 Letter, p. 7.
[16] Respondent's 11 December 2015 Letter, p. 1.

of this case."[17] Second, the Respondent contends that MINBYUN's Application for permission to make "a [substantive] written submission that 'will bring detailed factual legal argument and evidence…' if allowed, would have significant procedural implications, including with respect to the currently schedule Phase III hearing."[18]

20. Accordingly, as understood by the Tribunal, the Respondent does not support MINBYUN's Application.

IV. THE TRIBUNAL'S DECISION

21. The Tribunal's powers to grant the Application made by MINBYUN are circumscribed by ICSID Arbitration Rule 37(2). Its terms are legally binding upon the Disputing Parties as part of their arbitration agreement derived from the Belgium-Luxembourg-Korea BIT, as confirmed by Procedural Order No 1 made in these arbitration proceedings. This is common ground between the Disputing Parties. It is necessarily also accepted by MINBYUN, given that its Application is made expressly under ICSID Arbitration Rule 37(2).

22. ICSID Arbitration Rule 37(2) provides the following:

> "(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rules called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
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> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the

[17] Respondent's 11 December 2015 Letter, p. 1.
[18] Respondent's 11 December 2015 Letter, p. 1.

proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission."

23. As the Disputing Parties have noted, the third and final phase of the Hearing in this arbitration is due to begin on 5 January 2016. Accordingly, this Application comes very late in these arbitration proceedings, in circumstances where it could have been made a long time ago.

24. In the Tribunal's view, the granting of MINBYUN's request at this very late stage of this arbitration would likely cause significant difficulties for both Disputing Parties. Given that one or both sides would doubtless wish to comment on any substantive submission made by MINBYUN, it would most probably cause the third phase to be adjourned or, at least, to require a new fourth phase, with significant extra costs for the Disputing Parties and loss of time. The Tribunal notes that this same observation is rightly made by all Disputing Parties in this arbitration, albeit in different terms.

25. Accordingly, in these circumstances, the Tribunal decides that the intervention of MINBYUN as a non-disputing party would significantly disrupt these arbitration proceedings and, also, that it would unduly burden or unfairly prejudice one or more Disputing Parties. As cited above in the final paragraph of ICSID Arbitration Rule 37(2), the Tribunal bears an unqualified responsibility to "ensure" no such disruption, burden or prejudice takes place.

26. As to ICSID Arbitration Rule 37(2)(a), the Tribunal is not persuaded that MINBYUN has a perspective, particular knowledge or insight that is materially different from that of the Disputing Parties, particularly the Respondent with its counsel and its experts.

27. Given its two decisions above, the Tribunal does not consider it necessary to address here other factors, particularly under ICSID Arbitration Rule 37(2)(b). It should not, however, be assumed that MINBYUN could not meet the test for a significant interest in these arbitration proceedings under ICSID Arbitration Rule 37(2)(c).

V. THE TRIBUNAL'S ORDER

28. For the reasons stated above, the Tribunal rejects MINBYUN's Application under ICSID Arbitration Rule 37(2).

On behalf of the Tribunal,

V.V. Veeder
President of the Tribunal
Date: 21 December 2015