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Бактыбек кызы А.

КЫРГЫЗ РЕСПУБЛИКАСЫ ЖАНА КЫТАЙ ЭЛ РЕСПУБЛИКАСЫНЫН ЭКИ ТАРАПТУУ ИНВЕСТИЦИЯ КЕЛИШИМИН АНАЛИЗДӨӨ: КЕМЧИЛИКТЕРИ ЖАНА ЖАКШЫРТУУНУН ЖОЛДОРУ

Бактыбек кызы А.

АНАЛИЗ ДВУСТОРОННЕГО ИНВЕСТИЦИОННОГО СОГЛАШЕНИЯ МЕЖДУ КЫРГЫЗСКОЙ РЕСПУБЛИКОЙ И КИТАЙСКОЙ НАРОДНОЙ РЕСПУБЛИКОЙ: НЕДОСТАТКИ И ПУТИ СОВЕРШЕНСТВОВАНИЯ

Baktybek kyzy A.

ANALYSIS OF THE BILATERAL INVESTMENT AGREEMENT BETWEEN THE KYRGYZ REPUBLIC AND THE PEOPLE'S REPUBLIC OF CHINA: DEFICIENCY AND PERFECTION

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Бириккен Улуттар Уюмунун Соода жана өнүктүрүү боюнча конференциясынын (ЮНКТАД) маалыматы боюнча, Кыргыз Республикасы эгемендүүлүк алгандан бери 38 өлкө менен эки тараптуу инвестициялык келишим түзгөн, анын ичинен бул макалада Кыргыз Республикасы (КР)жана Кытай Эл Республикасынын (КЭР) эки тараптуу инвестиция келишимин кенири анализдеп чыгабыз. Бул келишим 1992-жылдын башында түзүлгөн, анын мазмуну инвестицияларды өнүктүрүүнүн бүгүнкү талаптарына жооп бербейт. Бул макалада КР жана КЭР эки тараптуу инвестициялык келишимдин кемчиликтери каралат, атап айтканда, эң жагымдуу режим, улуттук режим, адилеттүү жана тең укуктуу режим, улутташтыруу жана кыйыр экспроприация, ошондой эле Келишим түзүүчү тарап менен Инвестордун ортосундагы инвестициялык талаш-тартыштарды чечүү маселеси каралат. КР менен КЭР ортосундагы эки тараптуу инвестициялык келишимди өркундөтүү жолдорун сунуштайбыз, ал үчүн 2011-жылы өзгөртүлүп, кайра кол коюлган КЭР менен Өзбекстандын эки тараптуу инвестициялык келишимин изилдеп жана салыштырып чыгабыз, бул келишим көптөгөн жаңы маселелерди камтыйт, аларды изилдеп жана колдонуу зарыл.

Негизги сөздөр: *Кыргыз Республикасы, Кытай Эл Республикасы, эки тараптуу келишим, инвестиция режими, инвестициялык талашты чечүү.*

Согласно данным Конференции ООН по торговле и развитию (ЮНКТАД), Кыргызская Республика с момента приобретения независимости установила двустороннее инвестиционное соглашение с 38 странами мира, из них в данной статье мы детально рассмотрим Двустороннее инвестиционное соглашение между Кыргызской Республикой (КР) и Китайской Народной Республикой (КНР). Это соглашение было заключено в раннем 1992 году, его содержание уже не отвечает сегодняшним требованиям для продвижения инвестиций. В этой статье мы рассмотрим недостатки Двустороннего инвестиционного соглашения КР и КНР, в частности изучим положения касающиеся, режима наибольшего благоприятствования, национального режима, справедливого и равноправного режима, вопросы, связанные с национализацией и косвенной экспроприацией, а также с Разрешением споров между Договаривающейся Стороной и инвестором. Предложим пути усовершенствования Двустороннего Инвестиционного Соглашения КР и КНР, путем изучения и сравнения Двустороннего инвестиционного соглашения между КНР и Узбекистаном, так как оно было дополнено и повторно подписано в 2011 году, и включает в себя широкий спектр вопросов, которые нам следует изучить и заимствовать.

Ключевые слова: *Кыргызская Республика, Китайская Народная Республика, двустороннее соглашение, инвестиционный режим, разрешение инвестиционных споров*

According to the data of the United Nations Conference on Trade and Development (UNCTAD), the Kyrgyz Republic has established bilateral investment agreements with thirty-eight countries since its independence, in this article we will analyze in detail the Bilateral Investment Agreement between the Kyrgyz Republic (KR) and the People's Republic of China (PRC). This agreement was signed at the beginning of 1992, and its contents no longer meet the requirements of today's investment promotion. In this article, we will analyze the deficiency of the bilateral investment agreements between the KR and PRC, in particular the provisions on Most favored nation treatment, national treatment, fair and equitable treatment, nationalization and indirect expropriation, also the Settlement of disputes between the contracting parties and investors. We will suggest ways to improve the Bilateral Investment Agreement of the KR and PRC by studying and comparing the Bilateral Investment Agreement between the China and Uzbekistan, because this agreement has been supplemented and re-signed in 2011, and contains a wide range of provisions that we should study and learn from.

Key words: *Kyrgyz Republic, People's Republic of China, bilateral investment agreement, investment regime, investment dispute settlement.*

After the declaration of independence of the Kyrgyzstan, on January 5, 1992, the Kyrgyzstan and China established diplomatic relations, from that moment a new historical milestone in bilateral relations has began. On May 14, 1992, the Kyrgyzstan and China signed a Bilateral Investment Agreement (BIT) [1], on September 8, 1995, this agreement entered into force, but it is worth noting that it has not been revised and updated to this day. The BIT is a first generation agreement for both countries, its content is insignificant. [2] Kyrgyzstan - China BIT

includes a total of 12 articles, in particular, these are: Definitions; Promotion and Protection of investments; Investment regime; Expropriation; Transfer; Settlement of Disputes between the Parties; Settlement of disputes between One Party and Investors of the Other Party; Other obligations; The scope of the agreement; Consultations; Entry into force and duration. The preamble of the bilateral investment treaty clearly stipulates the objective of the agreement, that is, "Kyrgyzstan and China in accordance with the principles of mutual respect for sovereignty, equality and benefit, will protect, encourage and create favorable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party". [3] In general, BIT provides legal protection for foreign investors and promotes the development of investment relations between the Kyrgyzstan and China.

Deficiency of the Kyrgyzstan-China BIT.

1. Investment Regime Clause.

According to Article 3 of the Kyrgyzstan - China BIT "Each of the Contracting Parties undertakes to ensure in its territory a fair treatment and protection in respect of investments of investors of the other Contracting Party and activities related to such investments (Article 3, paragraph 1). The treatment referred to in paragraph 1 of this article shall be no less favorable than that which is granted to the investments of investors of any third country and activities related to such investments (Article 3, paragraph 2)." [4] Therefore, the Kyrgyzstan- China BIT provides fair and equitable treatment and most-favored-nation treatment for foreign investors.

Most-favored-nation treatment (MFN). The BIT does not contain clear provisions on MFN treatment, i.e. whether it is necessary to provide MFN at the "foreign investment admission stage" or at the "foreign investor operation stage". Kostyunina G.M. notes that, "according to world practice, the national regime is more often applied at the stage of operation of a foreign investor, and the MFN - at the stage of admission of foreign investments. Examples are the Group of Three, Mercosur, NAFTA." [5] Therefore, we can conclude that the MFN provided in Article 3 paragraph 2 of the Kyrgyzstan-China BIT includes not only the stage of admission of foreign investment, but also the stage of operation of a foreign investor.

National treatment. The Kyrgyzstan- China BIT doesn't provide at all "national treatment" for foreign investors. Today many bilateral investment agreements include national treatment in the stage of admission and at the stage of operation of foreign investments. For example, according to article 4, paragraph 1 of Kyrgyzstan-Kuwait BIT "Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in the territory of the State of the other Contracting Party, according to its national legislation." [6] Kostyunina G.M. thinks, that "many regional agreements also provide for national treatment at the stage of admission of investments. This means a partial liberalization of mutual investments, including the abolition of the requirements for the use of local components and other localization criteria, as well as the requirement for a balanced trade as a condition for admitting foreign investors to the markets." [7]

2. Dispute Settlement Clause.

Settlement of Disputes between the Contracting Parties. Article 7 of the Kyrgyzstan- China BIT stipulates the investment dispute settlement procedures between the contracting parties, which mainly includes two ways: 1. Diplomatic channels: "Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall be resolved through diplomatic channels as far as possible (Article 7, paragraph 1). 2. Arbitration. If the dispute cannot be resolved in this way within six months from the date of initiation of the dispute by one of the Contracting Parties, it shall, at the request of either of the Contracting Parties, be submitted to arbitration (Article 7, paragraph 2)." [8] The arbitral tribunal consists of three arbitrators. The arbitral tribunal should make its award in accordance with the provisions of the agreement and generally accepted principles of international law. The arbitration tribunal shall formulate its own rules of procedure.

Settlement of Disputes Between a Contracting Party and an Investor. According Article 8, "Any dispute between one Contracting Party and the investors of the other Contracting Party concerning the amount of compensation for expropriation may be submitted to the arbitral tribunal (Article 8, paragraph 1). Such an arbitral tribunal is established for each specific case as follows: each of the Parties to the dispute will appoint one arbitrator, and these two arbitrators will elect a citizen of a third state that has diplomatic relations with both Contracting Parties as an arbitrator - chairman. The first two arbitrators are appointed within two months, and the chairman is elected within four months from the date of written notice of the submission of the dispute to arbitration. If an arbitral tribunal is not established within the specified time limits, either of the Parties to the dispute may propose to the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce to make the necessary appointments (Article 8, paragraph 2). The tribunal shall determine its own procedure. The tribunal may, in determining the procedure, take as guidance the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Article 8, paragraph 3). The arbitral tribunal makes its decision by a majority vote. Such decision will be final and binding on both parties to the dispute. Each Contracting Party undertakes to execute the decision of the arbitral tribunal in accordance with their national legislation (Article 8, paragraph 4). The arbitral tribunal shall render a decision in accordance with the provisions of this Agreement, the legislation of the Contracting Party in whose territory the

investments were made, including its conflict of law rules, as well as the generally recognized principles of international law (Article 8, paragraph 5).” [9]

It is worth noting that, Article 8 of Kyrgyzstan-China BIT doesn't stipulate:

1. Consultations and amicably settlement. When revising the Kyrgyzstan- China BIT, we can refer Article 9 paragraph 1 Russian and China BIT, “Any dispute arising from investment between one contracting party and the investors of the other contracting party shall be settled through negotiation as far as possible [10].”

2. Local judicial remedies. According of Article 9 paragraph 2 item (a) Russian and China BIT, “If the dispute cannot be resolved through negotiations within six months from the date of its occurrence, it may be referred to the competent court of the Contracting Party that is a party to the dispute [11].”

3. International Center for Settlement of Investment Disputes (ICSID). According of Article 9 paragraph 2 item (b) Russian and China BIT, “The dispute can be referred to the ICSID. International Center for Settlement of Investment Disputes established in accordance with the Convention on the Settlement of Investment Disputes between States and Individuals or legal entities of Other States, signed in Washington on March 18, 1965 (provided that it has entered into force for both Contracting Parties), or in accordance with the ICSID Additional Rules (in case the Convention has not entered into force for any of the Contracting Parties) [12].”

Specific suggestion for improving the Kyrgyzstan-China BIT.

In improving and constructing Kyrgyzstan and China international investment rules, it is necessary to learn from the "Agreement on the Promotion and Protection of Investment between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan", because among the five Central Asian countries, only Uzbekistan has experience in revising and signing bilateral investment treaties with China. In March 1992, China and Uzbekistan signed the Agreement between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Mutual Protection of Investment for the first time. In April 2011, the governments of China and Uzbekistan re-signed the "Agreement on Promotion and Protection of Investment between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan" in Beijing (Hereinafter referred as, Uzbekistan and China BIT).

The new Uzbekistan-China BIT includes 18 Articles and it covers the following contents: Preamble; Definitions (Art.1); Promotion and Protection of Investment (Art.2); National treatment (Art 3); Most-favored-nation treatment (Art.4); Fair and Equitable treatment(Art.5); Expropriations (Art.6); Compensation for damages and losses (Art.7); Transfers (Art.8); Subrogation (Art.9); Denial of benefits (Art.10); Settlement of Disputes between Contracting parties (Art.11); Settlement of disputes between Investors and One Contracting party (Art.12); Other Obligations (Art.13); Application (Art.14); Consultations (Art.15); Interpretation (Art.16); Amendments (Art.17); Entry into force, duration and termination (Art.18).

In order to promote mutual investment between Kyrgyzstan and China, bilateral investment treaties should be revised and signed, and the experience of China and Uzbekistan in revising and signing bilateral investment treaties should be used for reference. For the improvement of the Kyrgyzstan- China BIT, this article puts forward the following specific suggestions:

1. Add the National Treatment clause.

As mentioned above, the Kyrgyzstan- China BIT doesn't provide National treatment at all. Uzbekistan and China BIT only stipulates the national treatment for foreign investment establishment stage, but it does not include the provisions for the stage of admission of foreign investments, nevertheless the National Treatment Article 3 of Uzbekistan and China BIT can be used for reference. So Kyrgyzstan-China BIT can make the following provisions: “Without prejudice to its applicable laws and regulations, with respect to the management, conduct, maintenance, use, enjoyment, sale or disposal of the investments in its territory, each Contracting Party shall accord to investors of the other Contracting Party and associated investments treatment not less favorable than that accorded to its own investors and associated investments in like circumstances [13].”

2. Improve the Most- Favored- Nation Treatment clause.

The Kyrgyzstan-China BIT does not clearly stipulate the most-favored-nation treatment, that is, whether to provide most-favored-nation treatment at the stage of admission or for establishment stage of foreign investment. The most-favored-nation treatment clause of Uzbekistan and China BIT is applicable for admission stage of foreign investments, which is worth learning. According Article 4 Paragraph 1 Uzbekistan and China BIT, “Each Contracting Party shall accord to investors of the other Contracting Party and the investments thereof treatment no less favorable than that it accords, in like circumstances, to investors and the investments thereof of any third State with respect to the establishment, acquisition, expansion, management, maintenance, use, enjoyment, sale or disposal of investments [14]”.

Uzbekistan and China BIT stipulates the scope of application of most-favored-nation treatment in dispute settlement procedures, which can prevent the arbitral tribunal from interpreting the most-favored-nation treatment provision extensively, and this clause is also worth including to Kyrgyzstan- China BIT. According Article 4 Paragraph 3 Uzbekistan and China BIT, “Notwithstanding Paragraph 1, dispute settlement mechanisms stipulated in other treaties shall not be referred to investment disputes in the framework of this Agreement”. [15]

3. Improve the Fair Treatment clause

The Kyrgyzstan-China BIT stipulates fair treatment, which shall not be lower than the most-favored-nation treatment clause. Article 5 of the China-Uzbekistan BIT provides more detailed provisions on fair and equitable treatment and full protection and security, which is worth learning from. The Kyrgyzstan- China BIT can make the following provisions, "Each Contracting Party shall ensure to accord to investors of the other Contracting Party and associated investments in its territory fair and equitable treatment and full protection and security. "Fair and equitable treatment" requires that investors of one Contracting Party shall not be willfully rejected to fairly judicial proceedings by the other Contracting Party or be treated with obvious discriminatory or arbitrary measures. "Full protection and security" requires that Contracting Parties shall take reasonable and necessary police measures providing investment protection and security. However, it does not mean, under any circumstances, investors shall be accorded treatment more favorable than nationals of the Contracting Party in whose territory the investment has been made." [16]

4. Improve the Expropriations clause

The Kyrgyzstan-China BIT Article 4 stipulates that, "The investment of investors of one contracting party in the territory of the other contracting party shall not be expropriated, nationalized or take relevant measures with similar effects to expropriation or nationalization. Unless such measures are taken in the public interest, in accordance with the procedures prescribed by law, on the basis of non-discrimination, and are accompanied by compensation." [17] It can be seen that the precondition for expropriation or nationalization are: (1) On the basis of non-discrimination; (2) For the public interest; (3) paying compensation; (4) According to legal procedures.

When re-signing the Kyrgyzstan-China BIT, should include the "indirect expropriation" definition into it. We can learn from the provisions of Article 6 of the China-Uzbekistan BIT, where indirect expropriation refers to "measure the effect of which would be equivalent to expropriation or nationalization". [18] "The determination of whether a measure or a series of measures of one Contracting Party constitutes indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: (a) the economic influence of a measure or a series of measures, although the fact that a measure or a series of measures of the Contracting Party has an adverse effect on the economic value of investments, standing alone, does not establish that an indirect expropriation has occurred; (b) the extent to which the measure or the series of measures grant discrimination in scope or application over investors and associated investments of the other Contracting Party; (c) the extent to which the measure or the series of measures cause damage to reasonable investment expectation of investors of the other Contracting Party: such expectation arises from the specific commitments made by one Contracting Party to the investors of the other Contracting Party; (d) the character and purpose of a measure and a series of measures, whether it is adopted for the purpose of public interest in good faith, and whether it is in appropriation to the purpose of expropriation."[19]

5. Improve Settlement of Disputes Between Investors and One Contracting Party Clause.

The Article 8 of Kyrgyzstan-China BIT stipulates the dispute settlement procedure between investors and one contracting party. The content of this article is too simple, investors and one contracting party can only resolve investment disputes through a special arbitration tribunal. Therefore, in revising the Kyrgyzstan- China BIT, it is necessary to learn from the provisions on dispute settlement between investors and contracting parties in Article 12 of the China-Uzbekistan BIT, because the agreement covers multiple ways to resolve disputes.

(1) Expand the scope of the object of dispute. Article 8, paragraph 1, of the Kyrgyzstan-China BIT stipulates that only disputes related to "expropriation" between foreign investors and contracting parties can be submitted to the arbitration tribunal for hearing. It is necessary to expand the scope of disputed objects. Here, we can learn from the provisions of Paragraph 2, Article 12 of the China-Uzbekistan BIT, If the host country violates the following provisions of the agreement, the foreign investor can claim to solve the problem through negotiation or arbitration: Article 2 Promotion and protection of investment; Article 3 National Treatment; Article 4 Most-Favored-Nation Treatment; Article 5 Fair and Equitable Treatment; Article 6 Expropriations; Article 7 Compensation for Damages and losses; Article 8 Transfers; Article 9 Subrogation; and Article 13 Other obligations.

(2) Include the clause of "Negotiation" into the Kyrgyzstan-China BIT. Consultation is an indispensable procedure for resolving investment disputes. Investment disputes between one contracting party and the investors of the other contracting party can be resolved through negotiation and consultation first. In this case, we can refer to the provisions of Paragraph 1, Article 12 of the China-Uzbekistan BIT, "Any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of State of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute, including conciliation procedures". [20]

(3) Include the clause of "Proceedings" into the Kyrgyzstan-China BIT. Most bilateral investment treaties stipulate that if an investment dispute can not be settled through negotiations, it can be submitted to the competent court of host country for hearing. When revising the Kyrgyzstan-China BIT, we can refer the proceeding clause stipulated in item1, Paragraph 2, Article 12 of China-Uzbekistan BIT, "If the dispute between an investor of one Contracting Party and the other Contracting Party can not be settled through negotiations within six

months, the dispute can be submitted to the competent court of State of the Contracting Party that is a party to the dispute". [21]

(4) Include the clause of "Arbitration Procedure" into the Kyrgyzstan-China BIT. Paragraph 2, Article 8 of the Kyrgyzstan-China BIT only stipulates that investment cases should be submitted to an ad hoc arbitration tribunal. According Paragraph 2, Article 12 of the China-Uzbekistan BIT resolve investment disputes includes the following ways: a) ICSID Arbitration Procedure. Both Kyrgyzstan and China are members of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. It is noteworthy that the Washington Convention has not entered into force for Kyrgyzstan. In this case, the investment disputes between foreign investors and contracting parties can only be resolved through the International Centre for the Settlement of Investment Disputes Additional Facilitation Rules (ICSID Additional Facilitation Rules). According China-Russia BIT Item2, Paragraph 2, Article 9, "If the dispute cannot be settled amicably through negotiations within six months from the date it has been raised, it shall be submitted Additional Facility Rules of International Centre for Settlement of Investment Disputes (provided that the Convention has not entered into force for either Contracting Party);" [22] b) An Ad-hoc arbitral tribunal to be established under the Arbitration Rules of the United Nations Commission on the International Trade Law (UNCITRAL); [23] c) To any other arbitration institutions or ad-hoc arbitral tribunals agreed by the disputing parties. [24]

(5) Include the clause of "Administrative review procedure" into the Kyrgyzstan-China BIT. According paragraph 2 Article 12 China-Uzbekistan BIT, "The other Contracting Party has the right to require the investor concerned to exhaust the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before the submission to international arbitration." [25]

(6) Include the clause of "Deadline for filing a claim" into the Kyrgyzstan-China BIT. According paragraph 4 Article 12 China-Uzbekistan BIT, "A dispute shall not be submitted to arbitration when more than three (3) years elapsed from the date that the investor first acquired or should have first acquired knowledge of the events which gave rise to the dispute." [26]

(7) Include the clause of "Obligation to enforce the award" into the Kyrgyzstan-China BIT. Kyrgyzstan-China BIT doesn't stipulate the clauses for the enforcement of the award. Here we can refer to the provisions of paragraph 8-9 Article 12 of the China-Uzbekistan BIT, "1. The arbitration award shall be final and binding upon both parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the award. 2. A disputing party may not seek enforcement of a final award until: (1) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other arbitration rules selected by both disputing parties: a) ninety (90) days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; b) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal by any disputing party." [27]

Conclusion.

On August 31, 1991 Kyrgyzstan declared independence. On January 5, 1992 Kyrgyzstan and China officially established diplomatic relations, and on May 14th of the same year, Kyrgyzstan and China signed the "Agreement between the Government of the Kyrgyz Republic and the Government of the People's Republic of China on the Promotion and Mutual Protection of Investment ". Because it was signed earlier, the agreement only contains the following provisions: Definitions; Promotion and Protection of investments; Investment regime; Expropriation; Transfer; Settlement of Disputes between the Parties; Settlement of disputes between One Party and Investors of the Other Party; Other obligations; The scope of the agreement; Consultations; Entry into force and duration.

After analyzing the agreement, we can see deficiencies of the "Agreement between the Government of the Kyrgyz Republic and the Government of the People's Republic of China on the Promotion and Mutual Protection of Investment "are as follows: Article 3 only stipulates fair treatment and most-favored-nation treatment, but does not make any provisions on the clause of "national treatment"; Article 4 does not include the "indirect expropriation" at all; Article 8 also does not make any provisions on amicable settlement through consultation, local judicial remedies, or the arbitration procedure of the International Center for Settlement of Investment Disputes (ICSID).

Therefore, in order to improve the "Agreement between the Government of the Kyrgyz Republic and the Government of the People's Republic of China on the Promotion and Mutual Protection of Investment ", it is necessary to make the following supplements: 1. Add the "National Treatment clause"; 2. Improve the definition clauses, Most-Favored-nation treatment clauses, Fair and Equitable treatment clauses, Expropriation clauses, Settlement of Disputes between Investors and One Contracting Party clause; 3. Add the Compensation for Damages and Losses clause, Subrogation and Transparency clauses.

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