School of International Arbitration

IACL
International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: Ampal-American Israel Corporation et al v. Arab Republic of Egypt ICSID Case No. ARB/12/11 – *Decision on Liability and Heads of Loss* - 21 February 2017

Case report by: Puneeth Ganapathy** Editor, Diego Luis Alonso Massa***

Summary: The ICSID Tribunal dealt with claims made under the US-Egypt BIT relating to expropriation of investments, breach of fair & equitable treatment ('FET'), breach of the full protection and security clause ('FPS') & breach of a Gas Supply Contract ('GSPA') (claimed as a breach of the treaty standards of Expropriation & FET and the Umbrella Clause). The GSPA was entered into between a company (EGM), of which Claimants were shareholders and an Egyptian public sector company (EGPC), comprising Officials of the Respondent State. EGM & EGPC had entered into the GSPA contract for the supply of Gas to EGM for onward sale primarily to Israeli customers. For this purpose, EGM had also made considerable tangible investments in the construction and establishment of a 192-kilometre-long Gas Pipeline.

Between 2008 and 2011, the Respondents engaged in certain measures that were alleged as breaches of the BIT by EGM, including revocation of a tax-free zone license and failure to protect the Gas Pipelines against 13 attacks by insurgents in the wake of the Arab Spring revolution. Further, the claimants also alleged that there were delays in supplies made to EGM by EGPC, in breach of the GSPA and this amounted to a breach of the Umbrella Clause and other obligations under the BIT. For this purpose alone, the Tribunal concluded that the actions of EGPC were attributable to the Respondent State under either of Articles 4,8 or 11 of the ILC Articles on the Responsibility of States. The tribunal held that it did have jurisdiction to consider the breach of the GSPA in so far as its breach rose to a breach of the BIT, by expropriation of the property interest created by the contract or breach of any legitimate expectations created by the contract. The remaining breaches of the BIT were directly in relation to the Respondent State and no issue on attribution arose.

With respect to the revocation of the tax-free zone license, the tribunal agreed with Claimants' argument that the license itself amounted to an investment under the BIT. The tribunal also considered the importance of the tax-free zone status to the economic structure of EGM's investments and activities. The tribunal thereafter found that the revocation of the license by the Respondent amounted to an expropriation of the same. With respect to the attacks on the Gas pipelines, the Tribunal found that the Respondent had failed to comply with the FPS obligations from the 5th attack, until the last attack, since the Respondent had a duty to take protective measures after the first few unforeseen attacks. Finally, with respect to the delays in supply under GSPA, the Tribunal found that only for a particular period from 2012 (following the termination of the GSPA), could the breach of the GSPA rise to the level

of an international delict or breach of the treaty. It found, being persuaded by an ICC tribunal's award on the same facts on a separate claim filed under GSPA that the GSPA had been unlawfully terminated by the EGPC (whose actions had already been attributed to the Respondent State). Therefore, the tribunal concluded that there was an expropriation of the contractual/property rights under the GSPA. Accordingly, the Tribunal found the Respondent liable for *first*, an expropriation of (i) the tax-free zone license (only up to the year 2025) & (ii) the rights under the GSPA (only from the unlawful termination of the GSPA) and *second*, for the failure to protect and secure the investment of the Claimants (from the 5th to the 13th Attack on the pipelines).

Main issues: Attribution, Expropriation, Breach of Full Protection and Security Obligation.

Arbitrators: Prof. Francisco Orrego Vicuña (Appointed by Claimant); Prof. Campbell McLachlan (Appointed by Respondent), QC; The Honorable L. Yves Fortier, QC (President)

Claimant's Counsel: Mr. Noah Rubins, Mr. Ben Juratowitch, Ms. Callista Harris (Freshfields Bruckhaus Deringer (Paris)); Mr. Robert Kirkness (Freshfields Bruckhaus Deringer (Singapore)); Mr. Ben Love (Freshfields Bruckhaus Deringer (New York)); Prof. Lucy Reed (National University of Singapore); Mr. Niv Sever, (Firon and Co Advocates, (Tel Aviv)); Mr. Sarwat Abd El-Shahid, Mr. Girgis Abd El-Shahid, Mr. Cesar R Ternieden (Shahid Law Firm (Cairo))

Respondent's Counsel: H.E. Mr. Ali Sokar, Mr. Abdel Monem Ameen, Mr. Mahmoud Elkhrashy, Mr. Amr Arafa, Ms. Fatma Khalifa, Ms. Reem Hendy, Ms. Lela Kasem (Egyptian State Lawsuits Authority (Giza)); Prof. Emmeanuel Gaillard, Dr. Yas Banifatemi, Mr. Mohamed Shalbaya, Mr. Youssef Daoud, Mr. Dimitrios Katskis, Ms. Yasmine El Maghraby, Ms. Yael Ribco Borman, Ms. Alia El Sadda, Mr. Omar El Sada (Shearman & Sterling LLP (Paris)); Mr. Alexander Uff, Ms. Ximena Herrera, Mr. Tsegaye Laurendeau, Ms. Margaret Clare Ryan, Mr. Edward Taylor (Shearman & Sterling LLP (London))

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Puneeth Ganapathy is an Advocate enrolled with the Bar Council of Maharashtra & Goa, and admitted to practice law throughout India. He is currently a graduate student pursuing an LLM in Dispute Resolution at University College London. He has prior experience in tax litigation and domestic arbitration before courts, tribunals and judicial authorities in India. He graduated with a B.A.LLB (Hons.) from the West Bengal National University of Juridical Sciences, Kolkata. Puneeth can be contacted at: https://www.linkedin.com/in/puneeth-ganapathy/

*** Lawyer, University of Buenos Aires, admitted to practice law in the City of Buenos Aires; Sworn Translator, University of Buenos Aires, Argentina. LLM holder in International Relations – with a specialization in Private International Law – Institut de Hautes Études Internationales, University of Geneva, Switzerland. Mr. Alonso Massa can be contacted at: https://ar.linkedin.com/in/diegoluisalonsomassa

Digest:

1. Facts of the Case

The Claimants are companies incorporated in the United States of America (¶ 1, *Decision on Jurisdiction*, 1st Feb 2017). The Claimants directly and indirectly own East Mediterranean Gas ('EMG') an Egyptian Company. EMG was formed as a result of discussions with the

Egyptian Government with respect to Gas exports to Israel (¶ 30). Egyptian Natural Gas Holding Company ('EGAS') was a State-owned company established by Egypt (¶ 27). EMG approached the Egyptian General Petroleum Corporation ('EGPC') to purchase Gas at source (¶ 32). Negotiations led to the signing of a preliminary agreement in 2000 (¶ 35). The Egyptian Government instructed EGPC to conclude an agreement with EMG on the lines of the 2000 agreement in 2004 (¶ 38). The supply agreement ('GSPA') between EMG and EGPC, as well as a tri-partite agreement between EMG, EGPC and EGAS was concluded in 2005 (¶ 40).

The claimants principally dealt with five measures that were the basis of the alleged violations of the US-Egypt BIT by the Respondents. *First*, that the Respondents revoked the tax free zone license acquired earlier by EMG, leading to an incidence of at least 20% tax on revenues (¶ 44); *Second*, that the Respondent coerced EMG into signing an amendment to the GSPA that affected pricing and quantities of supply (¶ 46); *Third*, that the Respondent consistently failed to meet supply obligations under the GSPA (¶ 53); *Fourth*, that the Respondents failed to protect and secure EMG's pipelines during attacks in the wake of the Arab Spring, in breach of the Full Protection & Security obligation. (¶ 55) *Fifth*, that they unlawfully terminated the GSPA in furtherance of a political motivation to discontinue exports to Israel (¶ 65, 66).

2. Procedural Background

The claimants filed the request for arbitration on 4th May 2012. (¶ 19, *Decision on Jurisdiction*). Respondent had made several objections to the jurisdiction of the tribunal on *ratione personae* & *ratione materiae* grounds. The Tribunal rejected Respondent's argument that the Claimants were not protected investors under the BIT. However, it upheld the Respondent's Objection in respect of one claimant, Mr. David Fischer. (¶ 346, *Decision on Jurisdiction*) The Tribunal further denied (i) Respondent's objections to entertaining claims based on the GSPA, to the extent these were alleged breaches of the treaty, (ii) objections based on the tax exclusion to the Treaty to the extent that tax measures were not excluded from the scope of the expropriation clause & (iii) objections based on illegality of the GSPA. (¶ 346, *Decision on Jurisdiction*). The tribunal also considered the arguments of the Respondent on abuse of process by the Claimants due to parallel arbitral proceedings.

There were parallel arbitration proceedings between other stakeholders of EGM and the Respondents (or the EGPC) and the tribunal found an overlap in the claim being pursued in the present arbitration and a Permanent Court of Arbitration proceeding. Interest in share-holding of 12.5% in EMG was being claimed through the indirect ownership of Claimant Company (Ampal) in the present Arbitration as well as by the direct ownership of Ampal-owned subsidiaries in the PCA proceedings. The tribunal therefore, held that in order to avoid double recovery, the Claimant had to elect to pursue this part of its claim exclusively in either forum. (¶ 346, *Decision on Jurisdiction*). In August 2016, the Claimant elected to pursue the identified part of the claim exclusively before the present tribunal, withdrawing this part of the claim from the PCA proceedings. (¶ 22)

The tribunal proceeded to decide questions of attribution, liability and heads of loss.

3. Analysis of Legal Issues by the Tribunal

The Tribunal divided the claims into six issues and decided them separately.

3.1 The revocation of the tax free zone license

The Claimant had been granted a tax free zone license valid until the year 2025. The Respondents revoked this in 2008. The tribunal had decided in its decision on jurisdiction that taxation measures could be contested under the treaty only for expropriations, since they were excluded from the application of the rest of the treaty. (¶ 151) Accordingly, the tribunal analyzed whether there was an expropriation in the revocation of the license.

The tribunal found that the tax free license in question, was specific to the Claimant and was an ‘investment’, falling within the ambit of the words “licenses issued pursuant to law” and “every kind of asset”, under the applicable BIT definition. (¶ 172-174). The tribunal accordingly held that the revocation of the license amounted to the direct taking of *that* investment (i.e. the license itself). (¶ 179-180). The Tribunal further found, based on evidence, that the tax-free character had been integral to the Economic structure of the investment in the EMG. (¶ 181-182) The tribunal therefore further held that the revocation of the tax license was tantamount to expropriation of the investment in the EMG. (¶ 183) The tribunal held that the expropriation satisfied the requirements of public purpose and non-discrimination, however, still warranting prompt and adequate compensation. (¶ 184-185)

The claimant also argued that they were certain or under a legitimate expectation to have retained the tax-free status after 2025. They accordingly sought a decision on liability with respect to revocation of the tax license even after the year 2025. This claim was summarily rejected by the Tribunal as being speculative. (¶ 192-193)

3.2 The alleged coercion in making Claimants sign the amendments to the GSPA

The claimants alleged that they were coerced into signing amendments to the GSPA, and that this was a breach of fair and equitable treatment, full protection and security standards and the umbrella clause of the treaty. (¶ 194) However, the tribunal held that as a preliminary requirement, the Claimant had failed to discharge the burden to prove coercion (¶ 196, 216), finding contrary evidence suggesting that the Claimants were amenable to the amendment (¶ 210). In determining coercion, the tribunal also analyzed whether the amendments to the GSPA had adversely affected the claimants, holding that they had no such effect (¶ 207, 211 & 213).

3.3 Attribution of the Acts of EGPC and EGAS to Respondent

The Tribunal accepted Respondent’s position that the International Law principles of attribution were inapplicable to contractual relations. (¶ 81) However, it clarified that the conduct of parties under the GSPA was relevant only to the extent that there was a breach of the BIT, in an expropriation of the property right in the contract or a breach of legitimate expectations under the contract. (¶ 81) Therefore, such conduct of EGPC under the GSPA could be tested on International Law rules of attribution, in so far as the conduct was being claimed as a breach of the BIT. The Respondent disputed that the conduct of the EGPC and EGAS under the GSPA contract was attributable to the Respondent. (¶ 134)

The tribunal held that EGPC was a State organ under Article 4 of the ILC Articles on State Responsibility. The tribunal relied on evidence to characterize the EGPC as a Public Authority, controlled entirely by the State of Egypt in its functioning and constitution. (¶ 138) The tribunal found similar evidence with respect to EGAS, apart from the fact that EGAS was wholly owned by EGPC. (¶ 139) The tribunal also held that the conduct of EGAS and EGPC was under the directions of the Respondent, and hence attributable to it under Article 8 of the ILC Articles, based on evidence on record suggesting that EGPC merely confirmed the decision of the Respondent in terminating the GSPA. (¶ 140-145) The tribunal further held that in any case the Respondent had adopted the conduct of EGPC under Article 11 of the ILC Articles. (¶ 140, 146)

3.4 The delivery failures by Respondent under the GSPA: 1 (between July 2009 – January 2011)

The Claimants alleged that the EGPC had failed to deliver quantities of gas in accordance with the GSPA until January 2011, resulting in lost profits. (¶ 226) The tribunal held that the dispute about the alleged delivery failure did not rise to an international delict such as expropriation or breach of the fair and equitable standard. (¶ 228)

The tribunal also did not accept Claimant's argument that the delayed deliveries amounted to a breach of the umbrella clause. The tribunal held that the alleged delays by EGPC were not in breach of the GSPA itself, based on the terms of the undertakings made therein. (¶ 230) The tribunal also considered the fact that delivery shortfalls resulted in the triggering of a procedure for compensation under the GSPA, which was complied with by the Respondent according to an ICC Tribunal that decided the contractual dispute under the GSPA. (¶ 232)

3.5 The delivery failures by Respondent under the GSPA: 2 (between July 2009 – January 2011) and during the Pipeline Attacks

During the wake of the Arab Spring, there were 13 attacks on the gas pipelines belonging to EMG, causing substantial damage to the pipelines as well as delivery failures by Respondent. (¶ 236) The claimant alleged a breach of the Protection and Security obligation in the BIT, in Respondent's failure to prevent the attacks. The Respondent however, claimed that these attacks constituted *force majeure* events, absolving it from responsibility. (¶ 237)

The standard of protection and security under the treaty in Article II of the BIT used the terms (that the content of the standard) "shall never be less than that required by International Law". The tribunal interpreted this to mean the requirement of full protection and security in international law. (¶ 240) The tribunal relied on decisions in *ELSI (USA/Italy)*, *AAPL v. Sri Lanka*, & *Pantechniki S.A. v. Albania* in holding that the standard was not one of strict liability but one of due diligence to be exercised by the State, which was to be assessed in light of the applicable circumstances (in this case disorder emanating from the Arab Spring). (¶ 242-244)

The arguments on *force majeure* as being canvassed by the Respondents had already been employed by EGPC in a related ICC arbitration between the parties. While the arguments in the present case were based on a breach of the BIT, the ICC tribunal had dealt with the contractual disputes between the parties. Therefore, the relevant tribunal had already dealt with the facts pertaining to the terrorist attacks. The present tribunal was also required to incidentally determine the breach of the GSPA and the validity of the termination of the GSPA, in order to determine whether a treaty breach had occurred from these actions. (¶ 253)

Therefore, this tribunal relied on the factual findings of the ICC tribunal in relation to the attacks as *res judicata* between the parties, since the parties to both arbitrations were the same. (¶ 259) The tribunal further stated that the *res judicata* effects of the ICC arbitration bound not only the Company party to a dispute, but also its shareholders, the latter being regarded as in privity with them. (¶ 260-261). The tribunal placed reliance on the awards in *RSM v. Grenada*, and *Apotex Holdings v. USA*, which applied the issue/fact estoppel against shareholders and parent companies respectively. (¶ 263-264)

The tribunal considered evidence that the Respondent failed to take any steps to prevent saboteurs from carrying out the attacks, and even refused to do so explicitly on one occasion, relying specifically on a technical report prepared by EGPC with respect to the 5th Attack in July 2011. (¶ 288) While accepting the merit of *force majeure* for the first few attacks, the Tribunal held that the first four attacks between February and July 2011 were enough to warn the Respondent and brought upon it a duty to take reasonable steps to protect and secure the pipelines from further attacks. (¶ 289) Accordingly, the tribunal held that, on the evidence, it was clear that Respondent had (from the 5th attack to the 13th attack) failed to exercise due diligence with reference to the obligation to protect and secure the investment under the treaty. (¶ 290)

3.6 Delivery failures by Respondent: 3 (following and arising from the alleged unlawful termination of the GSPA)

The tribunal reiterated that the breach of the GSPA was being considered only in light of the treaty, i.e. whether there was an expropriation of the property right in the contract or breach of legitimate expectations created by the contract. (¶ 292) The tribunal, apart from forming its own opinion, relied on the findings of the ICC tribunal, as earlier, which had held that EGAS' termination of the EGPC had been unlawful. (¶ 329)

The tribunal next considered whether the unlawful termination of the GSPA amounted to a breach of the BIT. The tribunal held that the 'rights conferred by the GSPA' answered to the definition of investment under the treaty, and therefore the rights in the GSPA itself could be seen as an investment. (¶ 339) These rights were expropriated by the termination of the Contract. The Tribunal concluded that EGPC's unlawful termination of the GSPA (attributable to the Respondent), had not been demonstrated to have been in compliance with any of the following: public purpose, non-discrimination, due process and compensation. (¶ 341) Accordingly, the Respondent was held to have unlawfully expropriated the property rights in the GSPA by acting through EGPC in unlawfully terminating the contract. (¶ 342-343, 347).

4. Decision

The tribunal held that the State of Egypt was in breach of the US-Egypt BIT with respect to three measures. *First*, there was an expropriation of the tax-free zone license by Respondent, which was an investment in itself. Other criteria for a lawful expropriation having been met, *compensation was to be determined for this act of lawful expropriation*. *Second*, the Respondent had *breached the obligation to protect and secure* the gas pipelines during the attacks in the wake of the Arab Spring and was to *compensate the Claimant accordingly*.

Third, the Respondent, through EGPC had unlawfully terminated the GSPA and therein expropriated the property rights of the claimant in the contract, without compliance with any of the pre-requisites for a lawful expropriation. Accordingly, the Respondent was liable to pay *compensation to the claimant for this act of unlawful expropriation.*

The tribunal dismissed all other claims raised by the Claimants, and reserved its decision on quantum and costs.

TDM IACL Case Report Ampal-American Israel Corporation et al v. Arab Republic of Egypt ICSID Case No. ARB/12/11
Decision on Liability and Heads of Loss - 21 February 2017, available on Transnational Dispute Management at
https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=17680