



School of International Arbitration

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International Arbitration Case Law

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International Arbitration Case Law

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Award Name and Date: Eskosol S.p.A. in liquidazione v. Italian Republic – ICSID Case No. ARB/15/50 – Decision on Respondent’s Application Under Rule 41(5) – 20 March 2017

Case Report by: Orlando José Guterres Costa Jr**, Editor Ignacio Torterola***

Summary: The Tribunal deals with a claim brought under the Energy Charter Treaty (ECT) and the ICSID Convention by Eskosol S.P.A. that arises from a series of measures adopted by Italy that allegedly affected Eskosol’s investments in the Italian energy sector by cutting tariff incentives, which altered the terms under which investments were made, in violation of Articles 10 (standards of treatment) and 13 (expropriation) of the ECT. The decision in hand concerns a preliminary matter, namely Italy’s application for dismissal of all of Eskosol’s claims on the grounds that they are “manifestly without legal merit,” pursuant to Rule 41(5) of the ICSID Arbitration Rules. The Tribunal dismissed all of Italy’s objections, as the issues brought to attention of the Tribunal were not regarded as “manifestly without legal merits”. Altogether, some of these objections are not precluded to be discussed again in a later stage of the proceedings.

Main Issues: ICSID Arbitration Rule 41 (5) – Nationality – Foreign Control – Definition of Investor – Lis Pendens – Res Judicata – Collateral Estoppel

Tribunal: Prof. Dr. Guido Santiago Tawil (Appointed by Claimant); Prof. Pierre-Marie Dupuy (Appointed by Respondent); Brigitte Stern (Appointed by Respondent, replacing P. M. Dupuy); Jean Engelmayer Kalicki (President).

Claimant’s Counsel: Ricardo Ugarte, Alejandro Garcia, Daniel Meagher, Stenafò Scotti, all of them from Winston & Strawn (London); Marco Pocci, from Winston & Strawn (Hong Kong); Christine Orlikowski, from Winston & Strawn (Washington)

Respondent’s Counsel: Gabriella Palmieri, Giacomo Aiello, Sergio Fiorentino, all of them from the Italian State’s Attorney General office; Maria Chiara Malaguti, from the Ministry of Foreign Affairs

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Digest:

1. Relevant Facts

The claimant is Eskosol S.p.A. in liquidazione, a company incorporated in the Italian Republic, and the respondent is the Italian Republic (¶ 2). This dispute arises from a series of measures adopted by Italy that allegedly affected Eskosol's investments in a 120-megawatt photovoltaic energy project in Italy. At the time Eskosol started its project, photovoltaic plants in Italy were subject to a regulatory framework that guaranteed fixed payments (feed-in tariffs or "FITs") for a duration of 20 years for qualifying projects. According to Eskosol, in spite of the guarantees offered to attract investments, Italy "abruptly and drastically" altered the terms under which investors could benefit from FITs, depriving Eskosol of such incentives and destroying its investment in violation of Italy's obligations under Articles 10 and 13 of the ECT (¶ 3).

Eskosol was established by its shareholders, a Belgian company Blusun S.A. ("Blusun") and four Italian nationals, Messrs. Vittorio Sisto, Roberto Scognamiglio, Luigi Dante and Gilberto Brana. Blusun in turn was owned by two individuals, Messrs. Jean-Pierre Lecorcier, a French citizen, and Michael Stein, a German citizen (¶ 20). From December 2010 to the present, Blusun has remained the owner of 80% of Eskosol's shares (¶ 21).

After massive investments on the planning and construction of a number of solar photovoltaic power plants, the Italian government issued the Legislative Decree No. 28 (the "Romani Decree"), which limited the scope of the FITs then in force to those plants that entered into operation within roughly two months from its date of publication, while establishing that those plants that entered into operation after that date but before March 28, 2012, would receive a reduced FIT under the unknown terms and conditions. On May 5, 2011, Italy's Ministry of Economic Development approved "Conto Energia IV" (or the "Fourth Energy Account") which reduced the FITs then in force, and allegedly created a risk that Eskosol would receive no FITs at all (¶¶ 23-26).

Eskosol asserts that these measures turned the development project economically unviable, and it had no alternative but to abandon it. It was unable to pay its debts and was declared insolvent and placed under receivership on November 12, 2013. Eskosol's bankruptcy receiver is Mr. Teodoro Contardi, who has the power to institute proceedings on behalf of Eskosol, as a matter of Italian law (¶ 27).

On February 21, 2014, ICSID registered an arbitration against Italy brought by Blusun and Messrs. Lecorcier and Stein (the "Blusun case" and the "Blusun claimants," respectively). The pleadings in the Blusun case have not been made available, but it appears undisputed that the case involved the Blusun claimants' investments in Italy through Eskosol, and challenged various measures including the Romani Decree and the Fourth Energy Account, which are at issue in the current case (¶ 28).

Eskosol asserts that the Blusun claimants initiated and litigated that case without consulting with Eskosol itself or with its bankruptcy receiver, and that they have not cooperated with Eskosol's insolvency proceedings. Eskosol asserts that it asked ICSID to consolidate this case with the Blusun case, but the request was denied. Subsequently, Eskosol filed an application based on Arbitration Rule 37(2) to file a written submission as a non-party, and it explained that the claims advanced by the Blusun claimants were of an "abusive nature", as they were seeking damages to which only Eskosol is entitled, which would cause prejudice to Eskosol, its creditors and its minority shareholders (¶¶ 29-31).

The Blusun tribunal denied Eskosol's Rule 37(2) application and proceeded to issue its final award on December 27, 2016. From the limited excerpts of the Blusun award that have been made available, it appears that the claims on the merits were denied, finding that the Romani Decree and the Fourth Energy Account (a) did not violate various provisions of the ECT, and (b) in any event were not the operative cause of the failure of the underlying project in Italy (¶¶ 32-33).

2. Procedural History

The claimant filed the request for arbitration on December 9, 2015 (¶ 5). On March 15, 2016, Prof. Dr. Guido Santiago Tawil accepted his appointment as arbitrator by Eskosol, and on April 6, 2016, Prof. Pierre-Marie Dupuy accepted his corresponding appointment as arbitrator by Italy. Prof. Dupuy withdrew his acceptance of his appointment, effective June 25, 2016, and Prof. Brigitte Stern thereafter accepted her appointment as arbitrator by Italy on August 1, 2016 (¶ 7). After a successful ballot for the appointment of the Tribunal President, Ms. Jean Kalicki accepted her appointment on October 19, 2016 (¶ 10).

On November 18, 2016, previous to the first session, Italy filed an "Objection for Manifest Lack of Legal Merits" pursuant to Rule 41(5) of the Arbitration Rules (the "Objection") (¶ 13). On December 2, 2016, the Tribunal held a first session with the Parties by teleconference, during which certain agreements were reached regarding the briefing schedule for the Objection. On December 23, 2016, Eskosol filed its "Response to Respondent's Article 41(5) Objection" (the "Response") (¶ 14).

On January 4, 2017, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. It provides that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, and that the place of proceeding would be Paris, France. Procedural Order No. 1 also sets out the agreed schedule for the jurisdictional and merits phase of the proceedings (¶ 15).

On January 13, 2017, Italy filed its "Reply on Rule 41(5) Objection" (the "Reply"). On February 1, 2017, Eskosol submitted its "Rejoinder to Respondent's Rule 41(5) Objections" (the "Rejoinder") (¶ 16). On February 8, 2017, the Tribunal held a hearing at the World Bank in Paris regarding the Objection (¶ 17).

3. Rule 41(5) - Objection for Manifest Lack of Legal Merits

Italy presented its Objection based on four separate grounds, which are as follows (¶ 43): (i) Eskosol cannot be considered "a national of another Contracting State" under Article 25(2)(b) of the ICSID Convention, due to lack of "foreign control" caused by its bankruptcy; (ii) Eskosol does not qualify as an "investor" under either the ECT or the ICSID Convention,

because it lacks “material qualities” to be defined as much; (iii) Under Article 26(3)(b)(i) and Annex 1D of the ECT, Italy declined to consent to arbitration of a dispute previously submitted to another forum; (iv) There is *lis pendens*, or even *res judicata* or collateral estoppel regarding the issues discussed in this arbitration and the Blusun arbitration.

Prior to assess the objections raised by Italy, the Tribunal first considered the criteria to be adopted on the Rule 45 (1) inquiry.

The Parties have largely agreed on the basic elements of a Rule 41(5) inquiry (“manifestly without legal merit”) (¶ 34). They agree that that Rule 41(5) pertains only to legal defects, including those involving either jurisdiction or the merits, but not to factual defects, which does not mean that factual premises of claims may not be acknowledged in order to understand the essence of the legal claim asserted (¶ 35).

The Parties also agreed that in order to be “manifestly” without legal merit, claims must be “plainly without merit” as a matter of law, and that the burden to demonstrate this lies on Italy as the Rule 41(5) applicant (¶ 37).

Although the Parties present different visions of the extent of analysis that may be appropriate for a tribunal to reach its decision that claims are manifestly without legal merit (¶ 38), the Tribunal accommodated the opinions of both Parties, and concluded that investment proceedings involve a level of sophistication and that the parties may consider it appropriate to brief legal objections at some length, in order to ensure an appropriate context for assessment, which does not render the objections too complex in itself for resolution under the “manifest” standard. At the same time, the Rule 41(5) procedure is not intended, nor should it be used, as the mechanism to address complicated, difficult or unsettled issues of law (¶ 41).

3.1 Eskosol’s nationality and the Notion of Foreign Control Under Article 25 (2) (b) of the ICSID Convention

Italy asserts that Eskosol should not be considered “a national of another Contracting State” under Article 25(2)(b) of the ICSID Convention, because on the date it submitted its request for arbitration, it no longer was under “foreign control” by virtue of Blusun’s majority shareholding, but rather was under the control of a bankruptcy receiver in Italy and an Italian bankruptcy court (¶ 45).

In Italy’s view, Article 25(2)(b) constitutes an exception that allows a departure from the principle of incorporation or *siège social* in favour of one based on foreign control, but it imposes two conditions that must be satisfied autonomously, which are that (i) the parties have agreed to treat a company as a national of another Contracting State for the purposes of the Convention, and that (ii) the company is subject to foreign control, which, according to Italy, both conditions must be assessed at the date of consent to arbitration (¶¶ 45-48).

Italy denies that both conditions were met. Firstly, it asserts that it did not conclude any agreement neither with Eskosol nor with Blusun to treat Eskosol as a national of another Contracting State (¶ 49), and that the ECT was intended solely for the protection of foreign investors, and that its Article 26(7) could not be construed as agreeing to allow a locally incorporated company the right to access ICSID arbitration after it has entered into

receivership (¶¶ 50-51), because from that date forward, the local entity is effectively under the control of its receiver and the Italian bankruptcy courts, not of its shareholders (¶ 51).

Italy observes that Article 26 (7) of the ECT refers to “foreign control”, and not to “majority of shares or capital”, and that the ‘Understanding’ regarding the meaning of “control” for purposes of the definition of “Investment” under Article 1, defines it as control in fact, determined after an examination of the actual circumstances in each situation, considering factors such as financial interest, ability to exercise substantial influence over the management and operation of the Investment; and ability to exercise substantial influence over the selection of members of the board of directors or any other managing body (¶ 54), and therefore, as Italian Bankruptcy Law deprives the debtor of the right to manage his business and to dispose of his assets, as custody and management of assets become the duty of the receiver, Eskosol is deprived of any actual control (¶ 55).

Also, control should exist at the time of consent, which would be the date Eskosol submitted its Request for Arbitration, when it was already under receivership, and consequently no longer under foreign control (¶¶ 56-58).

Eskosol argues that Article 26 (7) is enough as an agreement to treat companies under foreign control in the meaning of Article 25(2)(b) of the ICSID Convention (¶ 68), and that the management of a company’s liquidation can hardly equate to the management of a company in regular operation, as a receiver administers or manages the bankruptcy estate rather than the company itself, as the company has ceased to trade, and there is no management of the company as such, and that the only relevant criterion to determine control of the bankrupt company can be majority ownership (¶ 71).

Eskosol contends that Blusun remains a majority shareholder of Eskosol, and shareholders in an S.p.A. continue to enjoy significant prerogatives, including the right to bring an end to Eskosol’s bankruptcy proceedings by concluding an agreement with Eskosol’s creditors and to oppose Eskosol commencing these proceedings (¶ 72).

It also contends that the relevant date to determine the foreign control is the date when the dispute arose, because “Article 26(7) [of the ECT] expressly provides that the date on which such foreign control must exist is ‘before a dispute [...] arises’.” It notes that there is no dispute that Eskosol was controlled by a Belgian entity, Blusun, before this dispute arose (¶ 76).

The Tribunal considered that, in regard of the agreement to treat a host State company as a qualified foreign national investor, there are two subjective requirements under Article 26 (7) of the ECT which are undisputed met by Eskosol: (i) that such company has the host State nationality on the date of its consent in writing to ICSID, and independently, (ii) that the company must be “controlled by” investors of another Contracting Party before a dispute between it and that Contracting Party arises (¶ 88).

The additional objective requirement under Article 25(2)(b) of the ICSID Convention, however, states that an ICSID tribunal must undertake its own review of the facts regarding foreign control to confirm that control indeed was objectively exercised by a national of the Contracting State, inquiring whether it would be inconsistent either with the text of Article 25(2)(b) or with the purposes of the ICSID Convention to accept jurisdiction based on foreign control connected to the date on which a dispute arises (the ECT test), rather than the

date of consent to arbitration, and how the existence of foreign control should be evaluated for purposes of the ICSID Convention, and whether it would be inconsistent with the purposes of the ICSID Convention to accept jurisdiction over a claim filed by a local company after its entry into bankruptcy proceedings in the host State (¶¶ 90-91).

The Tribunal observes that, regarding the date on which foreign control must be established, it is a too complex issue to be evaluated under a Rule 41 (5) application, as there are divergences on interpretation of the Article 25(2)(b) – grammatical and contextual interpretations regarding foreign control and the date of consent – which have potential doctrinal consequences for future cases (¶¶ 94-98).

In reference to the alleged loss of foreign control through bankruptcy proceedings, the Tribunal noted that the mere status of being in bankruptcy proceedings is not enough to divest an entity from foreign control for purposes of ICSID jurisdiction to entertain an ECT claim, when the entity indisputably was both solvent and under foreign control prior to the State measures that it seeks to challenge, as the ECT alone only seeks to confirm foreign control prior to the dispute. It would not be consistent with the underlying purposes of the Convention to render an otherwise qualified foreign-owned entity suddenly ineligible to access its protections, simply because the entity’s liabilities eventually overtake its assets enough to justify (at least temporary) supervision of its activities to protect the rights of creditors (¶ 101).

Therefore, the Tribunal is unconvinced by Italy’s first objection, namely that Eskosol’s bankruptcy filing manifestly deprived it of foreign control prior to filing its Request, but Italy retains the right to try to convince the Tribunal otherwise at a subsequent stage of this proceeding (¶ 108).

3.2 The Claimant as an investor under the ECT and the ICSID Convention

Italy’s second objection is that Eskosol “lacks the material qualities of an investor,” because it was not the “actual investor” that “made the investment” in Italy as that term should be understood under Article 26 of the ECT and Article 25 of the ICSID Convention. Rather, Italy contends, Eskosol was merely the “*longa manus*” or instrumentality of the actual investor, which Italy contends was Blusun and its two shareholders, Messrs. Lecorcier and Stein (¶ 109).

Italy contends that it is too “formalistic” and “over-simplistic” for Eskosol to posit that it qualifies as an investor in Italy solely by reference to its incorporation in that country, and that an investor is so only if it makes an investment under the terms of the relevant treaty and in line with its aim and purposes (¶ 111).

The Tribunal noted that Italy does not attempt to define what those lacking “material qualities” are, and it’s not clear which requirements Italy insists that the investor must satisfy. It is not clear whether Italy urges a “checklist” approach or a more holistic analysis that takes a variety of issues into account for determining the “materiality” of an investor. Italy cites no specific provisions of either the ECT or the ICSID Convention to support such an exercise, and Italy does not even contend that there is settled jurisprudence on the issue, such that a tribunal could find a given entity to “manifestly” lack certain required “qualities” as a matter of law. Consequently, the Tribunal considered that the question is not appropriate for a Rule 41(5) decision, and it was denied (¶¶ 118-120).

3.3 Consent Under the ECT to Multiples Proceedings

Italy argues that the consent provided in the ECT did not extend to the initiation of a new arbitration proceeding involving what it describes as “perfect identity of object and cause” with the prior Blusun case. In Italy’s view, the consent in Article 26 of the ECT is subject to the limitation established in Article 26(3)(b)(i) (fork in the road provisions). Italy asserts that “the dispute” as referenced in Article 26(3)(b)(i) already has been submitted to arbitration in the Blusun case (¶¶ 121-122).

The Tribunal observed that this would require the Tribunal to find, under the Rule 41(5) standard, that at least three conclusions are each “manifest”. First, that it is manifest as a matter of law that the ECT’s “fork in the road” clause can be used to bar repeated ECT claims by the same “Investor” regarding the same “dispute,” and not merely resort to the ECT after resort to local proceedings or “previously agreed” procedures other than ECT arbitration. Second, that it is manifest as a matter of fact that Eskosol and Blusun constitute the same “Investor”, and finally that it is manifest that the present dispute is substantively the same one that Blusun submitted in the prior ECT case (¶ 133).

The Tribunal noted that it was sceptical that a fork-in-the-road clause is the appropriate doctrine to bar such abusive re-litigation; the appropriate doctrine would appear to be *res judicata*, addressed in the last objection submitted by Italy, and it goes against the very notion of “fork in the road”. As it demands more development on the last objection, the third objection was altogether denied (¶ 134-135).

3.4 Lis Pendens, Res Judicata and Collateral Estoppel

Italy’s final objection is that public international law principles prohibit the prosecution of multiple claims in relation to the same prejudice, and preclude the opening of a new proceeding on a dispute that previously was submitted to another international arbitration tribunal (*lis pendens*) or actually was decided by such a tribunal (*res judicata* or collateral estoppel) (¶¶ 136-137).

Regarding the application of the “tripe-identity test” to assess whether multiple proceedings have been opened on the same dispute, Italy suggests that the Tribunal should follow a flexible rather than a strict approach (¶ 138), so that the Blusun claimants and Eskosol be deemed identical (¶ 140), that this case and the Blusun case refer to the same dispute under all material tests, given the object and cause of action are identical (¶ 145), and that the same factors would justify dismissal under the theory of collateral estoppel as an alternative to *res judicata*, because the issues to be decided in this case are the same as those already addressed in the Blusun case, which established that the contested measures were fully legitimate and that the insolvency of Eskosol as well as the failure of the project were not caused by Italy’s behaviour (¶¶ 147-148).

The Tribunal focused on one criteria of the “tripe-identity test”, the identity of the claimants, and observed that the Tribunal cannot find it “manifest” that Blusun and Eskosol effectively were the same party, as although Blusun owns 80% of Eskosol, it is also apparent from the case caption in the Blusun case that the Blusun claimants did not join Eskosol itself as a formal party to the proceedings, as controlling shareholders often have the power to do by following the corporate formalities necessary to obtain approval to sue on a company’s behalf, but in opposite, both in the Blusun case and in the current one, Eskosol has argued

that the Blusun claimants had no authority to represent Eskosol's interests, proceeded without taking the required legal steps to act on Eskosol's behalf, and had no intention (if victorious) of channelling compensation through Eskosol so that its minority shareholders, as well as its creditors in bankruptcy, could share in the proceeds. Italy also claims reluctance to share the Blusun award with Eskosol, on the grounds that so doing might be considered a breach of its confidentiality obligations to the Blusun claimants, which at least suggests that Italy has some doubts that Eskosol and Blusun must properly be considered the same party (¶¶ 168-169).

Therefore, the Tribunal rejected the Rule 41(5) objection premised on the identity of parties between the Blusun case and this one, whether presented under the *res judicata* doctrine or the similar doctrine of collateral estoppel, and because it was far from manifest that the parties were identical, the Tribunal decided it did not need to proceed to the further steps in a preclusion analysis, involving identity of object and identity of cause (¶ 171).

3.5 Conclusion

In conclusion, the Tribunal denied Italy's application for dismissal of Eskosol's claims on the grounds that they are "manifestly without legal merit," pursuant to Rule 41(5) of the Arbitration Rules.

As Italy presented only fragments of the Blusun award, the Tribunal ordered Italy, to the extent and at such time as it wishes to rely on it for any purpose in this case, to produce such award in full, and it deferred ruling on allocation of the costs of the Rule 41(5) application, to be considered together with the allocation of further costs of this arbitration at a subsequent stage of proceedings (¶¶ 172-173).