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International Arbitration Case Law

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SWISSLION DOO SKOPJE V. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

Case Report by Sana M. Onayeva**

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In a decision rendered on 6 July, 2012, under the Agreement between the Macedonian Government and the Swiss Federal Council on the Promotion and Reciprocal Protection of Investments, signed on 26 September 1996 (the "Treaty") and pursuant to the ICSID Arbitration Rules, the Tribunal held that the Respondent had breached Article 4 (2) of the Treaty by failing to accord fair and equitable treatment to the Claimant's investment, dismissed all other Claimant's claims, and ordered the Respondent to pay € 350, 000 of the Claimant's costs of legal representation.

Tribunal:

H. E. Judge Gilbert Guillaume (President), Mr. Daniel M. Price and Mr. J. Christopher

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Digest

1. Introduction

Swisslion DOO Skopje (the "Claimant") commenced international arbitration proceedings against the former Yugoslav Republic of Macedonia on 9 July 2009 pursuant to the ICSID Arbitration Rules, alleging multiple violations of the Treaty. On 6 July 2012, the Tribunal issued an Award in which it ruled both on jurisdiction and the merits of the case. The Tribunal rejected the Respondent's jurisdictional and admissibility objections and held that the Respondent breached its Treaty obligation to accord fair and equitable treatment to the Claimant's investment, dismissed all other Claimant's claims, and ordered the Respondent to pay €350, 000 of the Claimant's costs of legal representation.

2. Facts and Allegations

The Claimant is a Swiss company wholly owned by Mr. Rodoljub Draskovic, a Serbian national. The Claimant had been successfully operated in Macedonia for several years before it decided to acquire the shares of Agropold, the former socially owned Macedonian enterprise.

The "First Tranche" of shares was completed in June 2006 and gave the Claimant a 26,58 % stake in Agropold, representing 5, 588 shares purchased respectively during March, April and June 2006.

On 14 June 2006 the Claimant acquired another 5, 339 shares in Agropold by winning the public tender on which the Government offered to sell the Agropold shares belonging to the Macedonian Pension Fund. In furtherance of this tender, the Share Sale Agreement ("SSA") was signed. With the Second Tranche, the Claimant came to hold 10, 927 shares of Agropold. Before acquiring the Pension Fund's shares, the Claimant submitted a Business Plan along with its bid in which the Claimant suggested the fundamental restructure of Agroplod.

Finally, on 4 July 2006, the Claimant accomplished the "Third Tranche" of shares by purchasing 788 shares of Agropold from a private party. As a

result of this transaction, the Claimant was the owner of 11, 715 shares in total, representing 55.72 % of the total shares in Agropold.

According to the Claimant, the Government took several actions in order to deprive the Claimant of its ownership once the financial situation of Agropold has improved. First, on 18 April 2008 the Macedonian Government requested the Second Skopje Basic Court to impose the provisional measures that would block the Claimant's enjoyment of Agropold shares. After this effort had failed, the State Attorney commenced the proceedings against the Claimant before the Securities and Exchange Commission ("SEC") with a purpose to freeze the Second Tranche of Shares. Despite the decision of the Constitutional court that SEC lacks jurisdiction, on 9 July 2008, SEC had issued an order „preventing Swisslion from voting or receiving dividend payments on the basis of 1, 356 Agropold shares, which formed part of the First Tranche". The Supreme Court consequently overturned this decision on 20 January 2009.

The Claimant asserts that on 20 January 2009, the court had granted the second Ministry's request for provisional measures and thus restricted the Claimant's use of the Second Tranche. Further, on 15 October 2009 the court terminated the SSA and ordered that the Second Tranche be transferred to the Ministry of Economy, without any compensation. Finally, the Claimant contends that the Respondent disrupted the Claimant's business activities by obtaining another court order on 2 April 2009 that prohibited the Bank from foreclosing on a mortgage on the Second Tranche.

According to the Claimant, criminal proceedings initiated by the Macedonian Government officials against the Claimant's General Manager, Mr. Meskov, then Chief Executive Officer of Agropold, Mr. Vasko Spirovski and a Swisslion appointee, aggravated the situation. It was asserted that the Claimant tried to deprive Agropold of its assets by signing a sham loan agreement with Agropold secured by a mortgage of Agropold's property. A public prosecutor who found them without a merit rejected these allegations. The news about investigation was immediately published in the newspaper next day under the headline "Criminal Charges of Agropold and Swisslion".

In its Memorial, the Claimant alleged the following Treaty violations by the Respondent: (i) Macedonia has unlawfully expropriated the Claimant's Second Tranche of shares in Agropold in violation of Article 5 of the Treaty (ii) the Respondent has failed to observe its commitments to the Claimant and breached Article 12 of the Treaty; (iii) Macedonia has unreasonably impaired the Claimant' enjoyment of its investment in violation of Article 4 (1) of the Treaty; and finally (iv) Macedonia treated the Claimant's investments unfairly and inequitably contrary to Article 4 (2) of the Treaty.

3. Legal Issues

(b) Fair and Equitable Treatment

The Tribunal upheld the Claimant's argument that the Respondent failed to provide fair and equitable treatment to its investment, pursuant to Article 4 (2) of the Treaty.

At the outset of discussion, the Tribunal noted that it would not engage in extensive discussion of fair and equitable treatment standard but rather adhere to the view expressed by certain tribunals that "the standard basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors". [1]

The Tribunal next identified the series of the Respondent's measures directed against the Claimant's investment that collectively amount to a composite act in breach of fair and equitable treatment standard. In the view of the Tribunal, the following measures collectively constitute an alleged breach of the standard:

> (i) The Respondent's (the Ministry of Economy) lack of timely response to successive requests by the Claimant for confirmation that its investments were being made in accordance with SSA.

The Tribunal found that it was not fair for the said Ministry not to respond to the Claimant when the latter sought confirmation of its claimed compliance. The

[1] See Award at 88, para. 273

silence on the part of the Government encouraged the Claimant to further invest in the company and continue to operate its business. In this regard the Tribunal stated:

"In such circumstances, the State had a duty to deal fairly with the investor by engaging with it, in particular to advice it of any concerns it may have had that the investment might not be in compliance with the investor's contractual obligations." [2]

(ii) The SEC proceedings initiated by the Respondent

The second element that according to the Tribunal contributed to the breach of the fair and equitable standard relates to the SEC proceedings initiated by the Respondent. The Tribunal was not convinced that that SEC imposition of restrictions with regard to the Second Tranche of shares had any basis. Particularly the Tribunal noted that SEC retroactively applied the Macedonian law on takeovers that was not initially applicable to the shares sold by the Government in a privatization. The law was only amended on 23 March 2007, nine months after the Claimant acquired the shares of the Second Tranche.

(iii) The 24 December 2008 publication by the Respondent (the Ministry of the Interior) of a criminal investigation initiated against the Claimant.

In respect of this measure, the Tribunal found that the wide publication of the initiation of criminal investigation against the Claimant's and Agroplod employees contributed to a general deterioration of the Swisslion prospects in Macedonia. Moreover, although the public prosecutor declared the allegations to be without a merit and refused to proceed with the prosecution, the result of this prosecutor's determination has never been published.

The Tribunal was persuaded by the Claimant's General Manager's testimony, that initiation of criminal investigation and its subsequent publication provoked lots of Media attention and significantly reflected on investor's reputation in Macedonia.

The Tribunal found that the measures discussed above, collectively, fall below the level of treatment to which the investor is entitled under Article 4 (2) of the Treaty.

(b) Expropriation

[2] Id. at 92, para. 287

The Tribunal ruled that there was no expropriation of the Claimant's Second Tranche of Shares, pursuant to Article 5 of the Treaty.

The expropriation claim of the Claimant is two-folded. First, the Claimant asserted that the courts of the Respondent's country effectuated the expropriation of the Claimant's Second Tranche by terminating the SAA on plausible grounds. Secondly, the Claimant contends that even if termination of the contract was lawful, the Claimant has never received the compensation to which it was entitled under the Macedonian law and the Treaty. The Claimant stressed out that its expropriation claim rests primarily upon the second element of the claim since expropriation claim does not depend on whether the contract was wrongly terminated.

The Tribunal dismissed the first argument of the Claimant that the courts effectuated the expropriation of the Second Tranche of shares. The Tribunal found that the SAA was terminated based on the decision of the Ministry, which was entitled to put that view before the courts. In this regard the Tribunal stated:

"The fact that the courts accepted that view and the judicial decisions have not been successfully challenged before this Tribunal means that the arguments that the court effected an expropriation must fail."[3]

The court's determination of the SSA breach and its consequential termination, according to the Tribunal, was not unlawful since it did not breach the Treaty. The Tribunal noted that the lawful termination of the contract cannot amount to an expropriation of contractual rights simply because the rights of the investor were terminated. The Tribunal ruled that since there was nothing illegal in the courts' decisions, the first element of the expropriation claim should be dismissed.

The Tribunal also rejected the Claimant's argument that the part of its investments had been expropriated, as a result of the Macedonian courts failure to award the compensation for the taking of shares. The Claimant had argued that "the failure to pay compensation for the taking of the shares and even to consider the issue was either grossly incompetent or in bad faith". [4]However, the Tribunal accepted the view of the Respondent's argument that although under the Macedonian Law, the Claimant had a chance to claim the Skopje Basic Court for a specific amount of compensation, the Claimant had never done so. The Tribunal next noted that the

[3] Id. at 100, para. 312

4 Id. at 102, para. 316

fact that the Claimant has never sought the said remedy in the court should not be viewed as an imposition of exhaustion requirement on the Claimant. Rather the Tribunal dismissed the expropriation claim based on the fact that "the Claimant has not proven the juridical fact on which the second limb of its expropriation case is based, i.e., that it had a clear right to recover the purchase price in that proceeding such that the court's failure to so order constituted an expropriation".[5]

(c) Observance of Commitments

The Tribunal dismissed the Claimant's argument that the Respondent is in breach of Article 12 of the Treaty. [6][7]

As a preliminary matter the Tribunal stated that "fundamental weakness of the claim is that even if the Share Sale Agreement were to be considered to be a "commitment" entered by the Respondent, the Tribunal has already found that the nature of the commitments made by Swisslion in the Business Plan and the contract itself were susceptible of different and conflicting interpretations and thus were disputable."[8]

The Tribunal rejected the Claimant's argument that the Respondent failed under Article 12 to "constantly guarantee" the observance of its commitments under the SSA. The Tribunal clarified that the Ministry did not terminate the SSA unilaterally but rather requested the determination of this issue from the courts. The Tribunal thus ruled that the Ministry did not fail to constantly guarantee the observance of its commitments by seeking, as provided in the contract, the termination of that contract in the courts.

(*d) Unreasonable Impairment*

The Tribunal dismissed the Claimant's claim that the Respondent subjected its investments to "unreasonable measures", pursuant to Article 4 (1) of the Treaty.

[5] Id. para. 320

[6] Article 12 of the Treaty provides that "either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting party."

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[8] Id. at 104, para. 323

The Claimant identified 5 ways in which its investments were impaired by the Respondent: (i) the restrictions imposed on the use of the Second Tranche of shares; (ii) the provisional measures restricting the Claimant's right to use the First Tranche; (iii) the prevention of the Claimant's enjoyment of its shareholdings in the subsidiaries by eliminating its control over Agropold; (iv) a judicial order that the bank to which the Claimant had granted a mortgage of the Claimant's shares in Agropold was prohibited from foreclosing on such mortgage which was said to have eliminated the security's value and impaired the Claimant's ability to maintain its financing arrangements; and (v) the victimising of the Claimant and its representatives in Macedonia through unjustified investigations and threats of prosecution.

After careful consideration of the measures complained of in the final claim, the Tribunal arrived to a conclusion that the stated measures are duplicative of the measures that have already been examined within the context of fair and equitable standard breach.

(e) Evaluation of Damages

The Tribunal decided to substantially reduce the amount of damages that can be awarded in this case because the Claimant did not succeed on its expropriation or substantial interference claim. Morevoer, the Tribunal noted that no damages could be awarded for losses flowing from the SSA termination.

In evaluating the damages the Tribunal took into consideration the following:

(i) the losses attributed to the measures found to be contrary to the Treaty's fair and equitable treatment standard; (ii) the legal fees incurred by the Claimant contesting the SEC and criminal investigation measures; (iii) the diversion of management's time in responding to the heightened controls whilst the Ministry of Economy caused investigations to be conducted without advising Swisslion that its contractual performance was a potential legal dispute; (iv) an allocation of the lost sales resulting from the reputational damage suffered in 2008.

Taking into consideration the above, the Tribunal concluded that the Claimant is entitled to €350, 000 in damages.

(f) Costs

After noting that both the ICSID Convention and the Arbitration Rules grants the Tribunal a wide discretion in awarding of costs, the Tribunal had carefully considered the parties costs submissions. The Tribunal next recalled that the Claimant prevailed only partially and its major claims were rejected. Bearing that in mind, the Tribunal ordered the Respondent to pay €350, 000 of the Claimant's cost of legal representation. Apart from this, the Tribunal awarded each party its own costs connected with the proceedings as well ad the fees and expenses of the arbitrators and charges for the use of the Centre's facilities and services.

4. Decision

On July 6, 2012, the Tribunal issued an Award that held that the Respondent breached Article 4 (2) of the Treaty by failing to accord fair an equitable treatment of the Claimant's investment. All other claims by either Party were rejected.