



School of International Arbitration

School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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SKY PETROLEUM, INC.

V.

**MINISTRY OF ECONOMY, TRADE, AND ENERGY OF ALBANIA,
NATIONAL AGENCY OF NATURAL RESOURCES OF ALBANIA**

CASE NO. A-12-CA-023-SS

ORDER AND PRELIMINARY INJUNCTION

Case Report by Ana Carolina Simões e Silva**
Edited by Ignacio Torterola***

An Order and Preliminary Injunction was rendered on 20 January 2012 by the United States District Court for the Western District of Texas, Austin Division, under the *Foreign Sovereign Immunities Act* (FSIA). The Court rendered its decision *ex parte* since the Defendants did not respond to the Plaintiff's motion and failed to appear at the hearing. The Court concluded that the general and special requirements for the grant of a preliminary injunction to compel arbitration were present, in particular that there was a valid, enforceable arbitration agreement and that the claims asserted fell within the scope of the arbitration agreement. Therefore, the Court ordered that the Ministry of Economy, Trade and Energy of Albania and the National Agency of Natural Resources of Albania and all persons acting in concert with them were enjoined from awarding, transferring or otherwise disposing of any right to explore, develop and/or produce petroleum in the contract area until a final arbitration award is issued pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in the arbitration proceedings between Sky Petroleum and Defendants and that the Defendants must submit the dispute to Arbitration in accordance with the terms of the arbitration clause in the Agreement.

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Court:	United States District Court for the Western District of Texas Austin Division – Sam Sparks – United States District Judge.
Claimant’s counsel:	Not Stipulated
Defendant’s Counsel:	Not Stipulated

Digest

1. Facts of the Case

Plaintiff, Sky Petroleum, Inc., (“Plaintiff”) concluded an oil production sharing contract with the Ministry of Economy Trade and Energy of Albania and the National Agency of Natural Resources of Albania (“Defendants”) entitled “Production Sharing Contract for the Exploration, Development and Production of Petroleum in Onshore Albania BLOCKS 4, 5 and DUMRE” (the “Agreement”).

Article XXI of the Agreement includes a mandatory arbitration clause according to which, “[a]ny dispute, controversy, claim, or difference of opinion, arising out of or relating to this Contract or the breach, termination or validity thereof, or to the Petroleum Operations carried out hereunder, shall be finally and conclusively settled by arbitration in accordance with the UNCITRAL Arbitration Rules [...]”

Defendants made efforts to terminate the Agreement and Plaintiff attempted to maintain the Agreement and compel arbitration.

On December 9, 2011, Sky Petroleum Inc. gave actual notice of its intent to arbitrate and formally served Defendants with a Notice of Arbitration on December 23, 2011. Defendants then informed Plaintiff of (i) their refusal to arbitrate, and (ii) their position that the Agreement is null and void.

Having been so informed, and having commenced arbitration proceedings pursuant to the Agreement, Plaintiff filed a Motion for Preliminary Injunction before the U.S. District Courts requiring the Court to grant injunctive relief to compel arbitration of the mineral rights dispute arising out of the Agreement with Defendants and pursuant to the arbitration clause contained in the Agreement. Sky Petroleum, Inc. is also seeking a preliminary injunction to preserve the status quo between the parties until the conclusion of the arbitration.

2. Legal Issues Discussed In The Decision

2.1 The Court has subject matter jurisdiction under the Foreign Sovereign Immunities Act to grant the injunctive relief sought

Section 1330 (a) of the *Foreign Sovereign Immunities Act* grants original jurisdiction to U.S. District Courts over “any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.”

The Defendants are both an “agency or instrumentality” of a “foreign State” pursuant to the *Foreign Sovereign Immunities Act* (§ 1603 (a)) “(a) A ‘foreign state’, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).” “(b) An ‘agency or

instrumentality of a foreign state' means any entity "(1) which is a separate legal person, corporate or otherwise, and "(2) which is an organ of a foreign state or political subdivision thereof, [...]) and both waived their sovereign immunity either expressly or implicitly pursuant to § 1605 (a) (1) and (2) ("(a) A foreign state shall not be immune from the Jurisdiction of courts of the United States or of the States in any case (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver; (2) in which the action is based [...] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States").

2.1.1 Express and implicit waivers of sovereign immunity pursuant to § 1605(a)(1) of the Foreign Sovereign Immunities Act

According to the Court, express and implicit waivers of sovereign immunity pursuant to the *Foreign Sovereign Immunities Act* can be found in the following instruments:

(i) the Agreement between the investor and the State agency or instrumentality providing for an express waiver of the right to claim sovereign immunity in connection with any proceeding to compel enforcement of the arbitration provision;

(ii) an implicit waiver arising out of the consent to resolve any dispute under the Agreement through binding international arbitration;

(iii) the Bilateral Investment Treaty between the foreign State (in this case, Albania) and the United States which authorizes, *inter alia*, the resolution of disputes such as a mineral rights dispute arising out of an oil contract: "(1) within United States tribunals such as this Court, (2) pursuant to "previously agreed dispute-settlement procedures," or (3) according to the 'UNCITRAL Arbitration rules.'"

2.1.2 Commercial activity of the foreign state elsewhere causing a direct effect in the United States pursuant to § 1605(a)(2) of the Foreign Sovereign Immunities Act

According to US case-law, causing a foreseeable economic loss in the United States constitutes "*commercial activity of the foreign state*" that "*causes a direct effect in the United States*" under § 1605(a)(2).

2.2 The general requirements for issuance of a preliminary injunction

According to US case-law, "*a preliminary injunction is an extraordinary remedy that should only [be issued] if the movant establishes: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.*"

2.2.1 A substantial likelihood of success on the merits

In the context of a dispute arising out of a contract between an investor and a State or State instrumentality or agency which the investor is seeking to compel to arbitration, a substantial likelihood of success on the merits sufficient for a Motion of Preliminary Injunction to be granted can be demonstrated where the plaintiff submits *prima facie* evidence that (i) it has complied with all material terms of its contract with the State or the State's agency or instrumentality; (ii) the State or the State agency or instrumentality party to the contract has failed to give the plaintiff proper notice or an opportunity to cure any breach of the contract and (iii) the plaintiff has submitted the dispute arising out of the contract to arbitration in accordance with the terms of the arbitration clause contained in the contract.

2.2.2 A substantial threat of irreparable injury if the injunction is not issued

In the context of a dispute arising out of a contract between an investor and a State or a State instrumentality or agency which the investor is seeking to compel to arbitration, a substantial threat of irreparable injury if the injunction is not issued exists where there is a risk that a third-party might assume the plaintiff's duties under the contract pending the arbitration. Indeed, under such circumstances, it would be extremely difficult to calculate the monetary damages to repair the harm suffered by the plaintiff.

2.2.3 The threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted

In the context of a dispute arising out of a contract between an investor and a State or a State instrumentality or agency which the investor is seeking to compel arbitration, the test as to whether the investor's threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted is satisfied where (i) the investor requesting the injunction seeks only to preserve the *status quo* pending arbitration (*i.e.* preserve its contractual position and its rights and obligations under the contract) and (ii) the investor requesting the injunction represents to the Court that a performance bond exists in favor of the State party in order to make the State whole should it prevail at arbitration.

2.2.4 The grant of an injunction will not disserve the public interest

In the context of a dispute arising out of a contract between an investor and a State or a State instrumentality or agency which the investor is seeking to compel to arbitration, the injunctive relief to enforce arbitration agreements serves the public interest.

This conclusion is reflected in the Bilateral Investment Treaty applicable in the instant case which authorizes preliminary relief to enforce arbitration agreements (Article XI(3)(b) of Albania-US BIT according to which "*a national or company, notwithstanding that it may have submitted a dispute to binding arbitration under paragraph 3 (a), may seek interim injunctive relief, not involving the payment of damages, before the judicial or*

administrative tribunals of the Party that is a party to the dispute, prior to the institution of the arbitral proceeding or during the proceeding, for the preservation of its rights and interests”).

Moreover, the lack of any other adequate remedy in law available to the plaintiff also justifies that the grant of the injunction will not disserve the public interest.

In the case at hand, there was evidence that the mineral reserves would be damaged if Plaintiff's operations were turned over to operators using inferior methods, and resultant losses to reserves would be difficult or impossible to calculate.

2.3 The special requirements for issuance of a preliminary injunction to compel to arbitrate

According to US case-law, a two-step analysis should be employed to determine whether a party may be compelled to arbitration. A court must ask whether the parties agreed to submit the dispute to arbitration. This first step consists in turn of two threshold inquiries: (i) whether a valid, enforceable arbitration agreement exists, and (ii) if so, whether the claims asserted fall within the scope of the agreement.

2.4 The amount of the surety bond required by the court in order to grant the preliminary relief sought

The amount of the surety bond required by the court in order to grant the preliminary injunction can be reduced where (i) the plaintiff represents that it has posted a performance bond in favour of the defendant which would cover damages under the contractual dispute; (ii) the court can hear the matter of the amount of the bond again upon motion and appearance of the defendant and (iii) the plaintiff is only requiring the court to protect its contractual right to arbitration and not to adjudicate the merits of the dispute.

3. DECISION

The Court granted Plaintiff's Motion for Preliminary Injunction.

The Court further ordered:

- that the Ministry of Economy, Trade, and Energy of Albania and the National Agency of Natural Resources of Albania (collectively "Defendants"), and all persons acting in concert with them, were enjoined from awarding, transferring, or otherwise disposing of any right to explore, develop and/or produce petroleum in the contract area until a final arbitration award is issued pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in the arbitration proceedings between Sky Petroleum and Defendants;

- that Defendants shall remove from their website or other publicly available documents all references that the contract area is "free" or otherwise available for new contractors, until the aforementioned final arbitration award is issued;
- that Plaintiff and Defendants shall arbitrate their dispute according to the terms of Article XXI of the Agreement;
- that Plaintiff Sky Petroleum shall post a surety bond in the amount of US\$ 50,000.00.

The Court also recalled that under the law of the United States its order is binding and immediately enforceable and binding upon the Ministry of Economy, Trade, and Energy of Albania and the National Agency of Natural Resources of Albania.