School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: Anglo-Adriatic Group Limited v. Republic of Albania (ICSID Case No. ARB/17/6) – Award – 7 February 2019

Case Report by: Annalisa Ciampi**, Editor Ignacio Torterola***

Summary: Claimant, a company incorporated in the British Virgin Islands, brought a claim against Albania under Albanian Law No 7764 on Foreign Investment (LFI) of 2 November 1993 alleging damages sustained in connection with privatization vouchers issued by the Republic of Albania. The Tribunal found that Claimant had not made a protected investment under LFI and therefore the Centre lacked jurisdiction to rule on this dispute.

Main Issue: Whether the "protected investor" is the owner of the "protected investment"

Tribunal: Prof. Juan Fernández-Armesto (President), Dr. Georg von Segesser (Arbitrator) and Prof. Brigitte Stern (Arbitrator)

Claimant's Counsel: Dr. Christoph Kerres, Mr. Felix Oberdorfer, Mr. Tino Enzi (Kerres Rechtsanwalts GmbH, Vienna)

Respondent's Counsel: Mr. Artur Metani, Mr. Helidon Jacellari, Ms. Brunilda Lilo (State Advocates Office); Ms. Amanda Neil, Mr. Eric Leikin (Freshfields Bruckhaus Deringer LLP, Vienna); Dr. Boris Kasolowsky, Ms. Enisa Halili (Freshfields Bruckhaus Deringer LLP, Frankfurt am Main); Mr. Përparim Kalo, Mr. Aigest Milo, Ms. Jola Gjuzi, Mr. Adi Brovina (Kalo & Associates, Tirana)

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Digest:

1. Relevant Facts

Anglo-Adriatic Group Limited ('AAG' or 'Claimant') is a limited liability company incorporated and operating under the laws of the British Virgin Islands (BVI) with its legal seat in the British Virgin Islands. Respondent is the Republic of Albania ('Albania' or 'Respondent') (¶¶ 1-3). The dispute relates to privatization vouchers issued by the Republic of Albania, and the collection of those vouchers by the Anglo Adriatika Investment Fund S.H.A. ('AAIF'). Claimant's alleged investment in Albania is the AAIF. Claimant avers that Respondent's refusal to allow the AAIF to participate in the privatization process breached Albania's undertakings assumed in the Law 7764 on Foreign Investment of November 2, 1993 ('LFI') (¶ 5).

Albania's agreement to arbitrate foreign investment disputes was formalized in Art. 8 LFI, which provides *inter alia* for the right of a foreign investor to submit a dispute relating to expropriation, compensation for expropriation or discrimination, to the International Centre for Settlement of Investment Disputes established by the ICSID Convention (¶ 6).

2. Procedural History

Claimant filed a Request for Arbitration on 29 December 2016, which was registered by ICSID on 17 February 2017 (¶¶ 7-9). The Tribunal was constituted on 21 July 2017 (¶ 13). The first session was held by means of a telephone conference on 16 October 2017 and Procedural Order No. 1 recording the Parties' agreement on procedural matters, providing *inter alia* 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, was issued on 2 November 2017 (¶¶ 18-19). On 1 December 2017, Claimant filed its Memorial on the Merits (¶ 20). On January 9, 2018, Respondent filed a Request for Bifurcation. On February 16, 2018, Claimant filed its Observations on Respondent's Request for Bifurcation. On March 8, 2018, the Tribunal issued its Decision on Bifurcation in which it decided to bifurcate the proceedings based on three objections raised by Respondent. The proceeding on the merits was thereby suspended (¶¶ 23-25). On 9 April 2018, Parties agreed to hold a jurisdictional hearing in Paris on 17, 18, and 19 July 2018 (¶ 35). On 17 April 2018, Respondent filed its Memorial on Objections to Jurisdiction. On 30 April 2018, Respondent filed an Application for Security for Costs (¶¶ 36-37). On 16 May 2018, Claimant filed its Response on Respondent's Application for Security for Costs (¶ 39). On 28 May 2018, Claimant filed its Counter-Memorial on Objections to Jurisdiction (¶ 42). The Tribunal decided to dismiss the Application for Security for Costs on 5 June 2018 (¶¶ 43-44). On 11 and 25 June, respectively, Respondent filed its Reply on Objections to Jurisdiction and Claimant filed its Rejoinder on Objections to Jurisdiction (¶¶ 45-46).

A hearing on jurisdiction was held in Paris from 17-19 July 2018, during which several persons testified ((¶¶ 66-67). Following the Parties' filing of post-hearing briefs and statements of costs, the proceeding was closed on 7 February 2019 (¶¶ 69-71).

3. Respondent's Objections

Albania alleged that the Tribunal lacked jurisdiction on the following four grounds: (i) Claimant has not established that it is a protected investor; (ii) Claimant has not made a protected investment; (iii) Claimant has not properly commenced this arbitration; and (iv) Claimant has committed an abuse of rights by bringing this arbitration.

3.1 Claimant has not established that it is a protected investor

Respondent submitted that Claimant was not a protected investor as it did not exist at the time

the dispute arose and thus could not have validly consented to this arbitration (¶¶ 115-116). First, Art. 25 of the ICSID Convention demands that jurisdiction *ratione personae* exist on the date the dispute is submitted to arbitration. Second, Albanian law provides that only an entity with recognized legal personality is empowered to enter into an arbitration agreement, or accept an outstanding offer to arbitrate (¶¶ 118-119). An order from the Eastern Caribbean Supreme Court of the BVI and the records of the Registrar of Corporate Affairs of the BVI showed that from 31 October 2011 to 7 June 2017, Claimant was a dissolved entity. On 7 June 2017, a BVI court reregistered Claimant and declared that its earlier dissolution was void and had no effect (¶ 116). In Respondent's view, the subsequent revocation of Claimant's dissolution may be effective under BVI law, but not under international law (the nationality requirement of Art. 25 of the ICSID Convention) and Albanian law. Since when it filed its Request for Arbitration Claimant was a dissolved company, its consent to this arbitration is non-existent and ineffective (¶ 120).

3.2 Claimant has not made a protected investment

Respondent argued that Claimant had failed to prove the existence of its two alleged investments. In the alternative, Respondent maintained that both of the alleged investments were illegal and fell outside Albania's consent to arbitrate (¶¶ 125-138).

3.3 Claimant has not properly commenced this arbitration

Respondent argued that the Tribunal lacked jurisdiction because Claimant failed to comply with the requirement, under Art. 8(2) LFI, of making a good faith effort to reach an amicable agreement to their dispute before starting an ICSID arbitration (¶ 139). First, the language of Art. 8(2) LFI must be understood to require that foreign investors make a good faith effort to reach an amicable agreement to their dispute prior to submitting it to ICSID. Second, Claimant has failed to provide any evidence that it satisfied this requirement (¶¶ 140-141).

3.4 Claimant has committed an abuse of rights by bringing this arbitration.

Respondent submitted that Claimant had engaged in an abuse of rights by seeking to artificially manufacture jurisdiction in this arbitration (¶ 143). According to the leading cases *Phoenix Action Ltd.* and *Philip Morris Asia Limited*, an abuse of rights typically arises where "an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute" (¶ 144). Claimant was dissolved at the time this arbitration was initiated and had not shown that it had made any investment at all in Albania. In Respondent's view, the attempt to artificially create jurisdiction constitutes an abuse of rights (¶¶ 145-146).

4. Claimant's reply to objections

Claimant alleged that the Tribunal had jurisdiction to hear its claims because: (i) Claimant is a qualifying investor; (ii) Claimant has made a protected investment; (iii) Claimant has properly commenced this arbitration; (iv) Claimant has not committed any abuse of rights.

4.1 Claimant is a qualifying investor

Claimant argued that it legally existed and was validly incorporated under the laws of British Virgin Islands and satisfied all of these requirements on the date the parties consented to submit this dispute to arbitration, *i.e.* 29 December 2016. Therefore, according to Claimant, it was a qualifying investor that met the conditions of Art. 25 of the ICSID Convention as well as the other legal requirements under Albanian law (¶ 149). According to Claimant, the jurisdictional *ratione personae* element is based on the legal existence of a company validated according to the laws of the State of its incorporation. The laws of the BVI acknowledged Claimant's continuous legal personality and valid incorporation from 17 January 1996 to date. The order of Eastern Caribbean Supreme Court (BVI) and the records of the Registrar of Corporate Affairs of the BVI showed that Claimant was in legal existence and good standing as of 29 December 2016. Claimant was deemed to have never been dissolved or struck off the register. Claimant contended that Albania was wrong when it asserted that Claimant was not a legal person established in accordance with the law of a foreign country for the purposes of the LFI. Claimant maintained that as of 29 December 2016, it had been in legal existence and good standing (¶¶ 150-151).

4.2 Claimant has made a protected investment

Claimant alleged that it had made two qualifying investments in Albania under LFI: Its first investment was AAG's beneficial ownership of 40% of the shares in the AAIF obtained *via* the Trust Deeds. Its second investment was the USD 5.33 million that Claimant provided to the AAIF (¶ 153).

4.3 Claimant has properly commenced this arbitration

Claimant submitted that this arbitration had been validly commenced, as there was no mandatory precondition under Art. 8(2) LFI that investors must try to reach a settlement before submitting the case to the ICSID. First, nothing in the language of Art. 8(2) LFI serves as basis to establish a mandatory duty or precondition to try to reach a settlement before bringing an arbitration against Albania. Second, Claimant had in any case proven that it tried to reach an amicable settlement before starting this arbitration (¶¶ 164-166).

4.4 Claimant has not committed any abuse of rights.

Claimant argued that it had not created jurisdiction artificially. Nor had Claimant ever performed any act or omission constituting an abuse of rights. First, the facts in this arbitration are different from the facts in *Phoenix Action Ltd.*, whose conclusions are not applicable to this case. The tribunal in *Phoenix* dismissed the claim because the investment was not made for the purpose of engaging in economic activity but to submit a pre-existing dispute to ICSID. In this arbitration, however, Claimant had shown that the investment was made for the purpose of engaging in economic activities. Second, Claimant did not carry out any corporate restructuring and had never hidden the fact that it did not directly hold the shares in the AAIF. Besides, the special purpose vehicle and the trust relationships involved in this arbitration are not unusual in international investment transactions and do not amount to any legal violation (¶¶ 168-170).

5. Tribunal's analysis

The Tribunal considered the second objection only. This second objection dealt with Claimant's allegation that it had made a qualifying investment in Albania under Art. 1 LFI. Claimant argued that it held two protected investments in Albania: The beneficial ownership of 50% of the shares in the AAIF, acquired *via* the Trust Deeds entered into with the Foreign Shareholders; and USD 5,334,133, which Claimant allegedly provided to the AAIF under an Ongoing Funding Agreement. Albania's position was that Claimant had failed to prove that either of these investments were ever made. In the alternative, Albania maintained that neither constituted a protected investment, because the investments were not carried out in accordance with Albanian law (¶¶ 174-175). The Tribunal first explained the relevant legal rules and the applicable law (5.1) and then examined the two alleged investments: Claimant's beneficial ownership of the Foreign Shares in the AAIF (5.2) and the funding to the AAIF allegedly made by Claimant (5.3). After examining the arguments and the evidence submitted, the Tribunal concluded that under Art. 1 LFI Claimant had not proven ownership of any protected investment in Albania, and consequently that the Centre lacked jurisdiction and the Tribunal competence to adjudicate this dispute (5.4). The Tribunal's findings as to the second objection rendered the remainder of Respondent's objections – valid existence of the investor, commencement of the arbitration and abuse of rights – moot and, as a result, the Tribunal did not address them (¶¶ 176-177).

5.1 Relevant legal rules and applicable law

According to Art. 25(1) ICSID Convention, the jurisdiction of the Centre extends to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. Claimant is a company incorporated and operating under the laws of the British Virgin Islands. Its written consent was explicitly included in its Notice of Arbitration, filed with ICSID on 20 December 2016. The consent of the Republic of Albania is formalized in domestic law, and more specifically in the LFI. Art. 8.2 LFI provides that foreign investors may submit their claims against Albania for compensation for expropriation or discrimination to ICSID arbitration, in accordance with the ICSID Convention (¶¶ 178-181). Art. 1 LFI also provides the statutory definitions of "foreign investor" and "foreign investment". According to Art. 1(2) LFI, the term "foreign investor" means every physical person that is a citizen of a foreign country, and every legal entity founded according to the laws of a foreign country that has carried out investments in Albania. The same provision requires that foreign investors must carry out an investment in the territory of the Republic of Albania in conformity with its laws. Further, Art. 1(3) LFI defines the term "foreign investment" as any kind of investment in the territory of Albania, performed directly or indirectly by a foreign investor, and then provides a list of examples, which includes shares in and loans to companies (¶ 182).

5.2 First alleged investment: Claimant's ownership of shares in the AAIF

AAG claimed to have made a protected investment in Albania under Art. 1 LFI, arguing that the Foreign Shareholders transferred beneficial ownership of the Foreign Shares (equivalent to 50% of AAIF's share capital) to AAG and held the Foreign Shares in trust for the benefit of AAG. To prove this investment arrangement, Claimant has provided four Trust Deeds dated October/November 1996 (¶¶ 188-189). Albania objected to the authenticity, validity, and legal effects of the alleged trust arrangements (¶¶ 192). The Tribunal sided with Albania for the following reasons. For the Tribunal to have jurisdiction, Arts. 1 and 8 LFI require the fulfilment

of three requirements: (a) existence of a protected investment; (b) existence of a protected investor, who acts as claimant in the arbitration; and (c) that the claimant is the owner or titleholder of the protected investment. In assessing these jurisdictional requirements, the burden of proof lies with Claimant, as pointed out in *Phoenix* (¶¶ 207-208).

Thus, after considering the evidence submitted in this case (¶¶ 212-229), the Tribunal concluded that AAG had not proved the third requirement: that Claimant is the owner or titleholder of the protected investment (¶¶ 237-247).

5.3 Second alleged investment: Claimant's funding to the AAIF

AAG claimed to have made a second qualifying investment in Albania under Art. 1 LFI: from 1994 to 2000 Claimant allegedly provided USD 5.33 million to the AAIF to cover its operating expenses (¶ 248). Albania replied that AAG had not proved having provided any money to the AAIF ((¶ 251). The Tribunal sided with Albania for the following reasons. As explained in the previous section, for the Tribunal to have jurisdiction, Arts. 1 and 8 LFI require the fulfilment of three requirements: (a) existence of a protected investment; (b) existence of a protected investor; and (c) that the protected investor is the titleholder or owner of the protected investment. Had Claimant made loans to the AAIF for over USD 5.33 million, such contributions would qualify as a "foreign investment" under the LFI. Loans are indeed included in the categories of protected investments under Art. 1(3)(c) LFI: "loans, monetary obligations or obligations in an activity of an economic value and related to an investment" (¶ 268). In this case, however, and after examining the evidence, the Tribunal concluded that Claimant had not proved the first requirement, *i.e*., the existence of a protected investment. After reviewing the record, the Tribunal did not find any convincing evidence that Claimant had actually carried out such funding (¶¶ 271-280). Furthermore, even if it is assumed *ad arguendum* that Claimant did facilitate a loan to the AAIF, such investment would not qualify as a protected foreign investment under the LFI, since it would have been made in breach of Albanian law (¶¶ 281-293).

5.4 Conclusion

The Tribunal concluded that the evidence in the record proves that the subscription of the Foreign Shares only resulted in the Foreign Shareholders, not Claimant, making an investment in Albania. Claimant had failed to prove that it is the owner of (or otherwise holds title in) the Foreign Shares. Claimant had also failed to prove that it provided a loan in an amount of USD 5.33 million to the AAIF. In any case, Albanian law prohibited funds from obtaining loans or borrowing money, and any loan granted by AAG to the AAIF would have run afoul of such prohibition, rendering the investment without protection under the LIF. For these reasons, the Tribunal found that Claimant had not made a protected investment under Arts. 1 and 8 LFI. The corollary is that the Centre lacked jurisdiction and the Tribunal, competence *ratione materiae* to adjudicate this dispute. Because the Tribunal concluded that there was no investment under the LFI, there was no need for the Tribunal to further address the issue of whether there was an investment for the purpose of the ICSID Convention (¶¶ 294-296).

6. Costs

The Tribunal decided that while each Party shall bear its own legal costs and expenses, Claimant shall bear the totality of the arbitration costs and ordered Claimant to pay Albania the amounts advanced by it (¶¶ 301-310).