Federal Court

Tribunal fédéral

Tribunale federale

Tribunal federal

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4A_244/2019

Judgment of 12 December 2019 1st Civil Chamber

Panel of judges

Federal Judge Kiss, President,
Federal Judges Hohl, Niquille,
Clerk Leemann.

Parties to the proceedings

Russian Federation,
represented by lawyers Elliott Geisinger and Christopher Boog,
Rue des Alpes 15bis, case postale 2088, 1211 Geneva 1, Petitioner on Appeal,

vs.

PJSC Ukrnafta,
Pereulok Nesterovskii 3-5, 04053 Kiew, Ukraine,
represented by lawyers Michael E. Schneider,
Dr, Marc Veit, Dominik Elmiger and
Philippe Hovaguimian,
Stampfenbachplatz 4, Postfach 212, 8042 Zurich,
Defendant on Appeal.

Subject matter

International arbitration,

Complaint against the arbitral award by the arbitral tribunal seated in Geneva dated 12 April 2019 (No. 2015-34).

Facts of the case:

A.
PJSC Ukrnafta, Kiev, Ukraine, (Claimant, Defendant on Appeal) is a company incorporated under the laws of Ukraine. Between 2003 and 2006, it acquired 16 petrol stations on the Crimean peninsula. Additionally, it leased office space in the city of Feodosia, where 30 employees wereworking. In 2013, after making additional investments, the Claimant controlled ten percent of the fuel market of Crimea. At the time, Crimea was part of the Ukrainian territory.

The Claimant is claiming that the Russian Federation (Respondent, Petitioner on Appeal) took measures that affected said assets in Crimea and led to their expropriation in the course of the integration of the Crimean peninsula in 2014 (on 21 March 2014, the Integration Treaty was ratified and the Integration Act issued). Thus, the Respondent violated the Agreement on the Encouragement and Mutual Protection of Investments dated 27 November 1998 (in force since 27 January 2000) between the Respondent's government and the Cabinet of Ministers of Ukraine (hereinafter referred to as the 1998 Bilateral Investment Treaty or 1998 BIT), in multiple respects, and is therefore obligated to pay compensation.

B.
B.a On 3 June 2015, on the basis of Art. 9 of the 1998 Bilateral Investment Treaty, the Claimant initiated arbitration proceedings against the Respondent before the Permanent Court of Arbitration (PCA) according to the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL RULES). It requested that the Respondent be ordered to pay compensation of USD 50,314,336 plus interest.

With a letter from its Ministry of Justice dated 12 August 2015 and an accompanying letter from its ambassador to the Netherlands dated 15 September 2015, the Respondent disputed the jurisdiction of the arbitral tribunal with respect to the claims asserted.

While the Claimant designated an arbitrator, the Respondent refrained from appointing one, which is why the Secretary General of the Permanent Court of Arbitration ordered the appointment of an arbitrator.

The presiding arbiter was appointed on 7 October 2015.

On 15 January 2016, the Claimant submitted its Statement of Claim, with argumentation, to the arbitral tribunal. The Respondent did not submit any answer by the deadline set.

On 11 July 2016, an oral session Took place in Geneva, in which the Respondent did not take part.

In its interim decision of 26 June 2017 (the "Award on Jurisdiction"), the arbitral tribunal seated in Geneva affirmed its jurisdiction.

By ruling dated 16 October 2018, the Federal Supreme Court dismissed an appeal lodged by the Respondent against the interim decision of 26 June 2017, insofar as it had gone into effect (matter number 4A_396/2017).

B.b The arbitration proceedings were continued during the federal appeal proceedings.

On 9 August 2017, the arbitration tribunal adopted the timetable for the further proceedings.

On 21 September 2017, the arbitration tribunal asked the parties material questions concerning the dispute.

The Claimant filed its response to the arbitration tribunal for the substantive evaluation of the case in a statement of 20 November 2017. The Respondent declined to answer the questions.

On 7 December 2017 a conference call was held in preparation for the oral session. The Respondent did not participate.

An oral session was held in Geneva on 5 and 6 February 2018. The Respondent declined to attend.

On 28 February 2018, the arbitral tribunal gave the parties the opportunity to comment on the selection of the expert to be appointed for the assessment of the damages.

The Claimant submitted its position to the arbitral tribunal on 6 March 2018, while the Respondent declined to do so.

On 30 May 2018, the assessor submitted a draft of his assessment to the arbitral tribunal.

The Claimant filed its response to this draft on 3 July 2018. The Respondent declined to take a position.

On 16 July 2018, the expert submitted the final version of his assessment, which was delivered to the parties the following day.

On 20 July 2018, the Claimant filed its response, whereas the assessment met with no response from the Respondent.

An oral session was held in Geneva on 20 August 2018. The Respondent did not attend.

On 13 October 2018, the expert filed a supplement to his assessment with the arbitral tribunal, which the Claimant commented on in a statement filed on 23 October 2018; once again, the Respondent declined to comment.

B.c In an arbitral award of 12 April 2019, the arbitral tribunal seated in Geneva determined that the Respondent had violated Art. 5 of the 1998 Bilateral Investment Treaty with regard to the applicant's investments, ordering the Respondent to pay damages to the Claimant in an amount of USD 44,455,012, with interest as from 22 April 2014.

The arbitral tribunal considered that the Respondent had expropriated the investments made by the Claimant in the form of 16 petrol stations, in violation of Article 5 of the 1998 Bilateral Investment Treaty, and that the Respondent owed the damages in the specified amount that basis.

C.

In an appeal in civil matters, the Respondent is requesting the Swiss Supreme Court to declare that the arbitral award of the arbitral tribunal seated in Geneva dated 12 April 2019 is either fully or partially invalid or, alternatively, that the contested arbitral award be set

aside. At the same time, the Respondent requested the granting of suspensive effect.

The Defendant on Appeal requests that the appeal, if and insofar as it is admissible, be dismissed. The arbitral tribunal has declined to comment.

The parties have filed reply and rejoinder.

D.
By an order dated 31 May 2019, the Swiss Supreme Court declined to grant the Petitioner on Appeal's request for the granting of suspensive effect.

Considerations:

1.
The Petitioner on Appeal requests that the present proceedings be consolidated with appeal proceedings 4A_246/2019 with regard to the arbitral award of the arbitral tribunal seated in Geneva of 12 April 2019 in arbitration proceedings PCA no. 2015-35. While proceedings 4A_244/2019 and 4A_246/2019 are based on comparable situations, the appeal petitions are not directed against the same decision, nor are the same parties involved in the two proceedings, which is why the court rejects the request to consolidate the proceedings.

2.
According to Art. 54 (1) of the Swiss Federal Court Act [Bundesgerichtsgesetz (BGG)], the decision of the Swiss Supreme Court is issued in an official language – generally in the one used in the award being contested. If this decision has been issued in another language, the Swiss Supreme Court will use the official language used by the parties. If the parties do not use the same official language, the decision of the Swiss Supreme Court will generally be rendered in the language of the appeal (Swiss Supreme Court Decision 142 III 521 E. 1).

In the present case, however, in which the Petitioner on Appeal filed its appeal in French and the Defendant on Appeal filed its documents in German, it must be considered that in these same arbitral proceedings the Petitioner on Appeal previously filed an objection the interim arbitral award concerning the jurisdiction with the Swiss Supreme Court in German (judgment 4A_396/2017 of 16 October 2018 E. 2), and at that time the Petitioner on Appeal was also represented by the same two attorneys who filed the appeal in the present proceedings. Consequently, as an exception to the general practice referred to above, the decision of the Swiss Supreme Court will be rendered in German, as in the previous appeal proceedings.

3.
In the area of international arbitration, the application is admissible under the conditions of Art. 190-192 of the Swiss Private International Law Act [Gesetz über das international Privatrecht (IPRG)] (SR 291) (Art. 77 (1) (a) BGG).

3.1 The arbitral tribunal is seated in Geneva in the present case. At the time in question, the parties had their places of establishment outside Switzerland (Art. 176(1), IPRG). Being that they did not explicitly exclude application of Chapter 12 of the IPRG, the provisions of that Chapter apply (Art. 176(2), IPRG).

3.2 Only the complaints listed exhaustively at Art. 190(2), IPRG, are admissible (Swiss

Supreme Court Decision 134 III 186 E. 5 p. 187; Decision 128 III 50 E. 1a p. 53; 127 III 279 E. 1a p. 282). According to Art. 77(3) BGG, the Swiss Supreme Court reviews only the grievances raised and reasoned in the set-aside application; this corresponds to the duty to submit reasons in Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (Swiss Supreme Court Decision 134 III 186 E. 5, p. 187, with further reference). Criticism of an appellate nature is not admissible (Swiss Supreme Court Decision 134 III 565 E. 3.1, p. 567; Decision 119 II 380 E. 3b, p. 382).

3.3 The appeal must be filed within the appeal period and must be fully substantiated (Art. 42(1) BGG). If the proceedings lead to a second exchange of documents, then the appealing party may not use the Reply to supplement or improve its appeal (see Swiss Supreme Court Decision 132 I 42 E. 3.3.4). The Reply is to be used only for statements prompted by representations made in the commentary of another party to the proceedings (see Swiss Supreme Court 135 I 19 E. 2.2).

Insofar as the Petitioner on Appeal goes farther than this in its Reply, these statements cannot be considered.

3.4 The Swiss Supreme Court may not rectify or supplement the factual findings of the arbitral tribunal, even when they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77(2) BGG, ruling out the applicability of Art. 97 BGG and Art. 105(2) BGG). It only reviews the factual findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190(2) IPRG are raised against them or, in exceptional cases, if new facts or evidence are being considered (Swiss Supreme Court Decision 138 III 29 E. 2.2.1 p. 34; Decision 134 III 565 E. 3.1 p. 567; Decision 133 III 139 E. 5 p. 141; each with further references). Anyone invoking an exception to the Swiss Supreme Court being bound by the facts established by the arbitral tribunal and wanting to correct or add to the factual circumstances based on them, is required to argue with precise file references that corresponding factual claims were already made in a procedurally compliant manner during the arbitration proceedings (see Swiss Supreme Court Decision 115 II 484 E. 2a, p. 486; Decision 111 II 471 E. 1c, p. 473; each with further references; see also Swiss Supreme Court Decision 140 III 86 E. 2, p. 90).

3.5 The Petitioner on Appeal failed to appreciate these principles when it makes a number of statements before the Swiss Supreme Court with respect to Mr Kolomoisky (one of the most important minority shareholders of the Defendant on Appeal), under reference to numerous newly submitted documents, and concluding from these that he obtained his assets through fraudulent activities and corruption. Despite arguments in the appeal to the contrary, there is no reason for the Swiss Supreme Court to consider any imputed facts that were not established in the contested decision (see, for example, with regard to the prohibition on new facts as set out under Article 99(1), BGG, with respect to facts not of general knowledge and known to the court, as in judgment 9C_748/2014 of 14 April 2015 E. 2.1; 4A_560/2012 of 1 March 2013 E. 2.2). Additionally, neither the fact argued in the appeal that the Defendant on Appeal failed to submit relevant facts nor the simple reference to the different procedural rules of a foreign legal system can lead to any result in the favour of the Petitioner on Appeal. On the contrary, it was up to the Petitioner on Appeal to assert these facts in a timely manner in the course of the arbitral proceedings. This, however, is something the Petitioner on Appeal chose not to do. The objection raised for the first time before the Swiss Supreme Court that the investments in question were made under fraudulent circumstances cannot be heard, which is why the complaint based on the violation of public policy in accordance with Art. 190(2)(e), IPRG, summarily fails.

4.
The Petitioner on Appeal submits that the disputed arbitral award is invalid or at least contestable for the reason that the matter of the dispute is not subject to arbitration.

4.1 In the contested award, the arbitral tribunal held that the dispute was covered by the territorial and temporal scope of the 1998 Bilateral Investment Treaty and that the Claimant had made an investment in Russia. This, in other words, assumes that as from a given date (being 21 March 2014) Crimea's status changed with respect to the 1998 BIT. The arbitral tribunal's determination on the status of Crimea had legal consequences on the parties, as well as on Ukraine itself, by virtue of fundamentally changing the obligations of the Contracting Parties to the Treaty although without a formal amendment pursuant to Art. 13 of the 1998 BIT or a tacit amendment. Tellingly, Ukraine had wanted to participate in the arbitration proceedings, which says something about the importance of the decision for the Contracting Parties to the 1998 BIT. The status of Crimea in the context of the Treaty or any change to this status is a question that cannot be decided by the Defendant on Appeal as a private legal person, nor can it be decided by any individual party to the Treaty unilaterally. Rather, Art. 13 of the 1998 BIT only allows the Contracting Parties to determine the scope of their respective obligations by way of a formal amendment to the treaty pursuant to the procedure provided in that article.

In the case in question here, the arbitral tribunal made a determination on an issue (the status of Crimea in the context of the 1998 BIT), a determination which had a fundamental impact on the obligations of the Contracting Parties, and one which by its nature could not be decided in arbitral proceedings between the Defendant on Appeal and the Petitioner on Appeal and which could not constitute a property law claim within the definition of Art. 177, IPRG. Additionally, it must be noted that the question of the status of Crimea, i.e., whether for the purposes of the 1998 BIT it is to be regarded as Ukrainian or Russian territory, is not merely a preliminary question to be answered by the arbitral tribunal, nor is it a simple matter of interpretation of the 1998 BIT by the arbitral tribunal. Rather, it is nothing more and nothing less than the answer to the question of whether the obligations of the Contracting Parties have changed in the wake of the integration of Crimea into the Russian Federation. The arbitral tribunal has taken the liberty of ruling on a question that is neither free to be determined between a State Party to the treaty and a private party nor subject to arbitration as defined in the scope of Art. 177, IPRG. The contested award must therefore be declared invalid (at least in part) in that it declares that the Crimean peninsula changed its nature in relation to the 1998 BIT as from a certain date. As an alternative, it should be annulled on the basis of a violation of public policy (Art. 190(2)(e), IPRG).

4.2 Contrary to what the Petitioner on Appeal appears to assume, the object of the dispute in the arbitral proceedings was not the status of Crimea in relation to the 1998 BIT or its status under the law of nations, but rather the claim brought by the Defendant on Appeal for compensation in a total amount of USD 50,314,336 plus interest as a result of the Petitioner on Appeal's alleged expropriation of its investments in violation of the Treaty. This is unquestionably a claim under property law within the definition of Art. 177(1), IPRG. The complaint that the dispute is not subject to arbitration is unfounded, and therefore the Petitioner on Appeal's assertions on this basis must fail for that reason. Contrary to the arguments set out in the appeal, the contested award is neither invalid nor appealable on the basis of the argument that the dispute is not subject to arbitration. Therefore, there is no need to address in more detail whether the objection raised against the final award for the first time on appeal can be reviewed at all, which the Defendant on Appeal disputes (see also Swiss Supreme Court Decision 143 III 578 E. 3.2.2.1 p. 586 f.).

Considered correctly, the Petitioner on Appeal is once again contesting the jurisdiction of

the arbitral tribunal, in that its assertions are directed against a consideration in the disputed award by which the arbitral tribunal was only citing from its own interim award of 26 June 2017 on the jurisdiction (no. 41: "In concluding that it had jurisdiction over the present dispute, the Tribunal held [in the Award on Jurisdiction of 12 April 2019] that 'the dispute falls within the territorial and temporal scope of application of the Treaty and that the Claimant qualifies as an 'investor' under the Treaty, having made an 'investment' in the territory of Russia in accordance with its legislation."). However, the Swiss Supreme Court has already ruled on the jurisdiction of the arbitral tribunal in its Decision 4A_396/2017 of 16 October 2018 (Swiss Supreme Court Decision 144 III 559), rejecting the appeal brought by the Petitioner on Appeal against the interim award by the arbitral tribunal insofar as upheld. Here the Swiss Supreme Court found the complaint that a consideration of subsequent border shifts would have required a further agreement between the State Parties in accordance with Art. 13 of the 1998 BIT was unfounded; the court also explicitly determined that the arbitral tribunal had rightly assumed that the territory of the Crimean peninsula was to be considered the "territory" of the Petitioner on Appeal within the definition of Art. 1(4) of the 1998 BIT, and was comprised under the territorial scope of validity of the Treaty (Swiss Supreme Court Decision 144 III 559 E. 4.3.2). Being that the Swiss Supreme Court has already made a decision on this point, and that decision has binding legal force, the arbitral jurisdiction can no longer be challenged by an appeal against the final decision.

The objection raised in the appeal that the contested arbitral award is invalid being that the matter of the dispute is not subject to arbitration, or at least contestable (on the basis of violation of public policy), fails.

5.
The appeal is to be rejected insofar as it can be taken into consideration. With the decision on the substance of the matter, the request for suspensive effect fails for lack of interest.

In line with the outcome of the proceedings, the Petitioner on Appeal has to bear the cost and pay compensation (Art. 66(1) and Art. 68(2) BGG).

Accordingly, the Swiss Supreme Court holds:

1.
The appeal is dismissed insofar as it is admissible.

2.
The court costs in the amount of CHF 105,000 shall be borne by the Petitioner on Appeal.

3.
The Petitioner on Appeal shall pay the Defendant on Appeal a total amount of CHF 155,000 as compensation for the Swiss Supreme Court proceedings.

4.
The Parties and the arbitral tribunal seated in Geneva will be notified of this decision in writing.

Lausanne, 12 December 2019

On behalf of the 1st Civil Chamber of the
Swiss Supreme Court

President: Clerk:

Kiss Leemann