

In the matter of:

PERTOBART LIMITED, Claimant

v.

THE REPUBLIC OF KYRGYZSTAN, Respondent

SCC Arbitration No. 126/2003

OPINION OF

ADNAN AMKHAN

Professor of International and European Law
Former Head of the Legal Affairs Department of the Energy Charter
Secretariat, Brussels

INTRODUCTION

1. My name is Adnan Amkhan. I am a Professor of International and European Law at BPP Law School, London. I am also an Honorary Fellow of the Edinburgh University Law School, where I teach international economic law and international commercial arbitration.
2. I was Head of the Legal Affairs Department of the Energy Charter Secretariat from 1 May 2000 to 31 July 2004.
3. Prior to joining the Energy Charter Secretariat, I was a lecturer in law at the University of Edinburgh where I taught and supervised postgraduate students in international law, international economic law and international commercial arbitration.
4. I have advised governments, international organizations, multinational companies and private clients on matters relating to international law, WTO law, international investment law, energy law and international commercial arbitration.
5. In addition, I have given expert legal opinions before domestic and international courts and tribunals, including the International Court of Justice, the Stockholm Chamber of Commerce and the International Chamber of Commerce.
6. I have been asked by Mr. Fred Wennerholm of Setterwalls Advokatbyrå, acting for Petrobart Limited, to give a brief opinion on certain matters concerning the Energy Charter Treaty and international law raised by the case of *Petrobart Limited vs. The*

Republic of Kyrgyzstan (SCC Arbitration No. 126/2003) and, in particular, to answer the following questions:

- (a) What is the legal nature of, and the applicable law to, the dispute before the present Arbitral Tribunal?
- (b) Under the circumstances of the instant case, is Petrobart an Investor who made an Investment in the Republic under the Energy Charter Treaty?
- (c) Is Petrobart's claim barred under the applicable law to this dispute?
- (d) In your view, is the Republic in breach of any of its obligations under the Treaty or international law?
- (e) In the event that the Republic is found to be in breach of any of its obligations under the Treaty or under international law, what legal remedies are available to Petrobart?

7. Mr. Wennerholm has provided me with copies of the following documents:

- Request for Arbitration, dated ???;
- The Respondent's Response to the Request for Arbitration;
- Statement of Claim, dated 20 February 2004;
- Statement of Defence, dated 24 March 2004;
- Response to Statement of Defence, dated 28 May 2004;
- Respondent's Rejoinder to Claimant's [sic] Statement of Defence, dated 26 July 2004;
- Claimant's First Rejoinder and Final Statement of Evidence, dated 11 October 2004.

8. To the best of my knowledge, this Opinion and the conclusions contained herein are true.

9. The facts of this case, which are largely uncontested, are fully set forth in the documents I have cited in paragraph 8.

ANSWERS TO CLAIMANT'S QUESTIONS

10. In this section, I shall answer the Claimant's questions in the order in which they have been put to me (para. 6). I shall refer to the arguments of the parties, as I understand them, wherever necessary.

“(a) What is the legal nature of, and the applicable law to, the dispute before the present Arbitral Tribunal?”

11. Petrobart, the Claimant, has brought the present arbitration proceedings against the Republic of Kyrgyzstan pursuant to the Arbitration Rules of the Institute of the Stockholm Chamber of Commerce.

12. Petrobart's Request for Arbitration is based on Article 26 of the Energy Charter Treaty, which is entitled “Settlement of Disputes between an Investor and a Contracting Party”. The Energy Charter Treaty (hereinafter referred to as the “Treaty”) is a treaty that has been concluded under international law.

13. The Claimant contends that the Respondent has breached several of its obligations under both the Treaty and the rules and principles of international law. Petrobart's claim is therefore a claim under international law and not a domestic law claim.

14. In addition, Article 26 (6) of the Treaty clearly stipulates, “A tribunal established under paragraph (4) [of Article 26] *shall* decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.”

15. I am therefore of the opinion that (i) the claim before the present Arbitral Tribunal is an international law claim and *not* a domestic law claim; further that (ii) all disputed issues arising in the present arbitral proceeding, whether or not they pertain to jurisdictional matters or merits, are governed by the relevant Treaty provisions

and applicable rules and principles of public international law. I find the Claimant's treatment of this issue legally accurate (see, section 4 of the Claimant's Response to the Statement of Defence).

16. It is also to be noted that questions of interpretation that might arise regarding the provisions of the Treaty will be determined in accordance with the interpretation rules set out in the 1969 Vienna Convention on the Law of Treaties, particularly Article 31.

“(b) Under the circumstances of the instant case, is Petrobart an Investor who made an Investment in the Republic under the Energy Charter Treaty?”

17. There is no doubt in my mind that both Contract No.1/98 dated 23 February 1998 (entered into between Petrobart and KGM) as well as the judgement Bishkek City Court, dated 25 December 1998 in favour of Petrobart fall within the definition of Investment under the Treaty. My reasons for this contention are the following.

18. First, Article 1(6) of the Treaty defines “Investment” in very broad terms. “Investment” covers “every kind of asset, owned or controlled directly or indirectly by an Investor”. The remainder of Article 1(6) lists what may also be regarded as Investments under the Treaty. The list is not exhaustive.

19. However, two items which have been specifically identified in Article 1(6)(c) and (f) as examples of an Investment are relevant to the present case. Paragraph (c) identifies “claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment” as an Investment. Paragraph (f) of the same Article refers to “any right conferred by law or contract ... to undertake any Economic Activity in the Energy Sector” as constituting an investment.

20. Second, Article 1(6) of the Treaty confines what constitutes an Investment to “any investment associated with an “Economic Activity in the Energy Sector”. The phrase “Economic Activity in the Energy Sector” is defined in Article 1(5) and includes “an economic activity concerning ... sale of Energy Materials and Products ...”
21. Third, according to Article 1(4) of the Treaty, the phrase “Energy Materials and Products” comprises materials and products listed in Annex EM. Under section 27.11, Annex EM specifies “gas and hydrocarbons” as covered by the Treaty.
22. It follows from the above that both Contract No.1/98 between Petrobart and KGM and the Bishkek Court’s judgment in favour of Petrobart clearly qualify as Investments under the Treaty. There is therefore no doubt in my mind that, from the Treaty’s perspective, Petrobart is an Investor who made an Investment, to which the provisions of the Treaty apply.
23. However, the Respondent seems to argue that Contract No. 1/98 mentioned above does not qualify as an investment under the Kyrgyz Foreign Investment Law (1997). In support of this assertion, the Respondent invokes two decisions. The first decision is the Bishkek Court ruling in the “Application for the Establishment of Facts of Legal Value” (the “Show-Cause” case). The second decision is the 2002 jurisdictional decision rendered by an arbitral tribunal established under the UNCITRAL Rules, pursuant to the Kyrgyz Foreign Investment Law.
24. I am of the firm opinion that neither of the above mentioned decisions relied upon by the Respondent is relevant or determinative of whether Contract No. 1/98 is an Investment under the Treaty.

25. As noted above, pursuant to Article 26(6) of the Treaty all disputed issues before this Arbitral Tribunal are to be decided in accordance with the Treaty provisions and applicable rules and principles of international law and *not* in accordance to Kyrgyz Foreign Investment Law.

26. The Respondent puts forward an additional argument, contending that Contract No. 1/98 does not qualify as an investment under the Treaty because it was concluded on 23 February 1998, that is before the Treaty entered into force. This assertion is unfounded on two separate grounds. First, the penultimate paragraph of Article 1(6) clearly provides that the term “Investment” includes all existing investments on the date that the Treaty entered into force. Secondly, pursuant to Article 45 of the Treaty, most signatories of the Treaty, including Kyrgyzstan and the UK, undertook to apply the Treaty provisionally, pending its entry into force.

27. As to whether the two decisions rendered under the Kyrgyz Investment Law bar Petrobart’s present claim, I would respectfully refer the Arbitral Tribunal to my answers to the following question.

“(c) Is Petrobart’s claim as submitted barred under the applicable law to this dispute?”

28. In several places in its submissions, the Respondent argues that both or either of the decisions rendered by the Bishkek Court in the Show-Cause case and the UNCITRAL arbitral tribunal constitutes *res judicata*. This, according to the Claimant, bars the present Arbitral Tribunal from hearing Petrobart’s claim under the Treaty.

29. I am of the opinion that this assertion is untenable on several grounds.

30. I will first deal briefly with the Show Cause case. This case was initiated by the Kyrgyz Republic before a domestic court. The question at hand was whether Contract No. 1/98 constituted an investment under the Kyrgyz Foreign Investment Law (1997). The Court ruled that it did not.
31. The essence of the Respondent's argument is that the Bishkek Court decision that Contract No. 1/98 was not an investment bars the present Tribunal from hearing Petrobart's Claim. According to the Respondent, this is because (i) the issue as to whether or not Contract No. 1/98 constituted an investment had already been determined in the negative by the Bishkek Court and (ii) the Claimant should have raised the Treaty claim there and then.
32. Neither of these two grounds is sustainable for the following reasons. First, the Show Cause case was initiated by the Kyrgyz Republic and not by Petrobart. To accept that the Show-Cause case bars the present claim under the Treaty would in effect amount to usurping an exclusive right that has been granted to Petrobart by the Treaty (i.e. recourse to international arbitration). In other words, any state which is a Contracting Party to the Treaty would be in a position to prevent an Investor from relying on the Treaty's arbitration dispute settlement mechanism simply by initiating a claim of any nature before domestic courts. This cannot have been the intention of the drafters of the Treaty.
33. Under the Treaty, it is the Investor and not the State which has the right to initiate judicial or arbitral proceedings. Each Contracting Party to the Treaty has given its unconditional consent to be taken to international arbitration by an Investor for an alleged breach of Treaty obligations. The Investor cannot be forced

to argue its grievances in front of a domestic court by resorting to elementary stratagems.

34. The second reason as to why the Show-Cause case ruling does not constitute *res judicata* is following. Even if we were to assume, for the sake of argument, that Petrobart did appear before the Bishkek Court, the ruling as it stands is of a wholly jurisdictional nature, and was not based on the same legal grounds as the present claim. The two claims are incommensurate.

35. I am therefore of opinion that the Show-Cause case cannot legitimately bar Petrobart's Treaty Claim as submitted before the present Arbitral Tribunal.

36. Now, I shall say a brief word about whether the 2002 UNCITRAL arbitral decision bars Petrobart's claim. My firm belief is that it does not. This is for the following two main reasons. First and foremost, the arbitral tribunal's award in the said case was purely of jurisdictional nature as well. The tribunal dismissed the case because it lacked jurisdiction under the Kyrgyz Foreign Investment Law (1997). No ruling on the merits was rendered by the arbitral tribunal. It is a well-established principle of international law that jurisdictional determination does not constitute a bar to a subsequent claim. Secondly, it is clear that the legal grounds upon which the present claim has been initiated are entirely different from the grounds invoked in the 2002 arbitration.

37. Therefore, my answer to the above question is that Petrobart's claim as submitted before the present Arbitral Tribunal is not barred by the doctrine of *res judicata* under the circumstances of the present dispute.

38. It follows from the above that the present Arbitral Tribunal does possess jurisdiction over Petrobart's Claim. This is because the Claim as submitted fulfils all the conditions set out in Article 26 of the Treaty, particularly its paragraphs (1), (2), (4) and (5).

“(d) In your view, is the Republic in breach of any of its obligations under the Treaty or international law?”

39. I understand that both parties to this dispute are in agreement as to the facts of this case. Therefore, my answers to the above question are based on this same understanding.

40. It is clear from Article 26 (1) of the Treaty that the present Arbitral Tribunal has full jurisdiction to hear claims concerning an alleged breach by the Republic of Kyrgyzstan of its obligations under Part III of the Treaty.

41. Part III of the Treaty (entitled “Investment Promotion and Protection”) imposes several obligations on its Contracting Parties. Whether any of the obligations enumerated therein have been breached is to be determined in light of the available facts and in accordance to the applicable law (i.e. the provisions of the Treaty and rules and principles of international law).

42. I have examined the facts submitted and agreed upon by the parties carefully, and it is in light of these facts that I wish only to highlight some of the following issues.

43. First, pursuant to Article 10(1) of the Treaty, the Respondent was under clear obligation to “encourage and create stable, equitable, favourable and transparent conditions” for Petrobart. The facts as indicated in the parties' submissions clearly indicate that this had *not* been the case. The defunct, KGM, was an

emanation of the Respondent. The Respondent not only owned KGM, but also controlled its economic activities. Also, KGM was charged with providing a public service.

44. The facts also indicate that the Respondent intervened both directly and indirectly in a manner that led to KGM's ultimate insolvency.

45. The Respondent argues that KGM was in a state of insolvency at the time that Contract No. 1/98 was concluded. This is disputed by the Claimant. The Respondent's assertion in this regard, even if true, does not exonerate the Respondent from its Treaty obligation stated above. The Respondent, as the owner of KGM, failed to alert Petrobart of this fact. This in itself amounts to a failure to provide "stable, equitable, favourable and transparent conditions". In addition, the various Presidential Decrees and their endorsement by the government which led to KGM's bankruptcy cannot be said to have created "stable, equitable and favourable conditions". In fact, they prove the opposite.

46. Having examined the evidence submitted by the Claimant as Exhibits C 72 and C34, I am of the opinion that these and other facts clearly establish that the Respondent has breached its obligation as stated above.

47. Second, pursuant to Article 10(1) of the Treaty, the Respondent had undertaken to accord the Claimant "... at all times a fair and equitable Treatment..."

48. The fact of this case leads me to conclude that the Respondent had failed to accord the treatment required by the above mentioned provision of the Treaty. Suffice it to say that the Vice Prime Minister's letter to the Bishkek Court requesting the postponement

of the execution of the latter's judgment of 25 December 1998, and the subsequent transfer by the Respondent of KGM's assets to other State owned entities cannot in any way be regarded as "fair and equitable" treatment. I have also examined and found relevant the authorities invoked by the Claimant in support of its arguments that the Republic has breached its Treaty obligations by failing to accord fair and equitable treatment to the Claimant (see, Exhibits: C 74 and C75).

49. Third, there is substantial factual evidence to support the Claimant's argument that the Respondent has clearly failed to abide by its obligations under Article 10(12). Paragraph 12 of Article 10 provides that the Respondent was under obligation to ensure that its domestic law provides effective means for the assertion of claims and enforcement of rights with respect to Investment. However, there is no evidence that this has been the case. In fact, the overwhelming evidence is to the contrary. The Vice Prime Minister's intervention in judicial proceedings and the court's readiness to comply with such intervention are two prime examples of the Respondent's failure to abide by this obligation.

50. Fourth, the Claimant invokes certain authorities in support of its argument that the various interventions by the Respondent in KGM's affairs amount to measures equivalent to expropriation, and therefore breach Article 13(1) of the Treaty (section 7.8 of the Claimant's Response to Statement of Defence). I find such arguments, which have been supported by relevant legal authorities, persuasive.

51. I also note that the Respondent's contention that these breaches occurred due to its restructuring programme does not furnish legitimate grounds for exonerating it from such clear breaches its Treaty obligations.

52. Therefore, based on the facts of the present case, the Respondent has committed several breaches of its obligations under the Treaty and international law.

“(e) In the event that the Republic is found to be in breach of any of its obligations under the Treaty or under international law, what legal remedies are available to Petrobart?”

53. It should be noted at the outset that with regards to claims based on the Treaty, the determination of available remedies for an aggrieved investor is carried out under the relevant rules and principles of international law and not domestic law.

54. In the instant case, there seems to be an agreement between the parties that the *Factory at Chorzow* case establishes the general rule regarding the consequences of breach under international law (the case has been submitted as Exhibit C 31). It is also to be noted that the Draft Articles on Responsibility of States for International Wrongful Acts (see Exhibit C 32) has been widely accepted as a codification of the rules and principles of state responsibility. The Claimant has accurately referred to some of the relevant articles, in particular: Articles, 31, 32, 35 and 36(2).

55. It is to be noted, however, that in case the Arbitral Tribunal is minded to find the Respondent’s action(s) amounting to “ ... a measure or measures having equivalent to nationalization or expropriation”, the available remedy is specifically stated in Article 13(1)(d) of the Treaty, namely: “... prompt and adequate and effective compensation”.

56. The Respondent appears to acknowledge the principal debt as stated by the Claimant. However, the Respondent argues that this amount would not have been paid due to KGM’s insolvency and

subsequent bankruptcy. The Claimant has argued, inter alia, that KGM's insolvency and its subsequent bankruptcy were due to the various interventions by the Respondent. The Claimant also argues that the Respondent's various interventions in KGM's affairs leading to its bankruptcy were not only in breach of the Respondent's Treaty obligations but also in contravention of its domestic law. In support of the latter argument, the Claimant has submitted an affidavit of Mr. Shea, an expert in and a drafter of Kyrgyz bankruptcy law. I am in no position to comment on this issue.

57. However, it seems to me that in light of the available evidence, it is clear that the Respondent's various interventions in KGM's affairs constituted the real cause that led to the frustration of Contract No. 1/98. These central interventions could legitimately be characterized as measures amounting to expropriation, or what traditionally is known "creeping expropriation". I would also suggest that the Respondent's frequent interventions explain Petrobart's inability to enforce its rights pursuant to the Bishkek Court's judgment of 25 December 1998.

58. As illustrated above, the Respondent's various interventions constitute breaches of its obligations under the Treaty. These breaches were the direct cause of Petrobart's losses, including lost profits. It follows therefore that Petrobart is entitled to the remedies available under international law.

59. The Respondent argues that Petrobart is not entitled to lost profits because they are speculative. Petrobart has shown, through a simple calculation, that it would have received said profits had the Contract No. 1/98 not been frustrated or expropriated by the Respondent's interventions (see the Claimant's

arguments in this regard in section 8.2.3). The Respondent must bear the responsibility for this.

60. As regards the claim for outlays and other expenses, it is for the claimant to provide evidence that such expenses were incurred in relation to its performance of Contract No. 1/98 and its various attempts to secure the payment of the principal debt.

Summary

61. The above analysis may be summarized as follows:

- a. Petrobart's Claim in the present proceedings is an international law claim. Therefore, the relationship between the disputing parties is governed by the Treaty provisions and relevant rules and principles of international law. Domestic law is not determinative of the issues in this dispute.
- b. Petrobart is an Investor who made an Investment under the Energy Charter Treaty.
- c. The present Arbitral Tribunal is not barred from hearing Petrobart's claim as submitted. The doctrine of *res judicata* does not apply under the circumstances of this case.
- d. The various interventions by the Respondent in KGM's affairs, on which there is a broad agreement between the parties, constitute a number of breaches by the Respondent of its obligations under the Treaty.
- e. It is a well-established principle of international law that the consequence of breach is reparation. Reparation includes monetary damages. According to Article 32 of the International

Law Commission's Draft on State Responsibility such damages
"... shall cover any financially assessable damage including loss
of profits insofar as it is established."

A handwritten signature in black ink, appearing to read 'Adnan Amkhan', with a stylized, cursive script.

Adnan Amkhan
30 October 2004.