PCA Case No. 2017-15
A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG, Hamburg (Germany)
vs/
The Czech Republic

SEPARATE DECLARATION

Stanimir A. Alexandrov
May 11, 2020

I agree with most of the analysis and conclusions of the Award. My views, however, differ from those of my esteemed colleagues on several important points.

Expropriation: The Award concludes in para. 628 that there was no expropriation because, *inter alia*, Claimant does not argue that Respondent's actions had an expropriatory intent (iii); and that both the bankruptcy trustees and the Czech courts acted in accordance with Czech law and therefore lawfully (iv).

I do not believe that the question whether there was an intent to expropriate is determinative. Whether there was an expropriation is a question of result, of effect, not a question of intent or purpose. Further, the question of whether the bankruptcy trustees and the courts acted in accordance with Czech law is, of course, relevant, but not dispositive. It is entirely possible that a host State's conduct is in full compliance with its domestic laws, yet inconsistent with international law and in breach of the BIT. Thus, to conclude that the trustees and the courts acted in accordance with Czech law *and therefore lawfully* under international law is incorrect.

In my view, the correct analysis is to look at the effect of Respondent's conduct. Claimant's aircraft were included in the bankruptcy estates and sold. As the Czech courts themselves ultimately concluded, the aircraft should not have been included in the bankruptcy estates in the first place. Claimant received the value of the sold aircraft. The analysis should focus on the difference between that sale value and the value of the aircraft at the time of the sequestration.

The Award appears to recognize that this is the proper analysis by referring to "the difference in value between the time of their lawful sequestration and their lawful sale" (para. 628(vi)). However, it concludes earlier (para. 628(i)) that "[t]he temporary sequestration of disputed assets during the course of bankruptcy proceedings can amount to expropriation only if … upon determination that the asset does not properly belong in the bankruptcy estate, the assets (or their fair value at the time of such determination) are nonetheless not returned to the owner." In my view, this is not the correct standard. The question is rather whether there was a substantial loss of value between (i) *the time of the sequestration* and (ii) the time of the sale (and the corresponding return of the proceeds to Claimant).

I believe that the Award should have examined Claimant's arguments relating to the value of the aircraft at the time of the sequestration, should have determined what that value

was, should have compared that value with the amount received by Claimant as a result of the sale, and should have determined on that basis whether there was a substantial deprivation of value. If so, then the Award should have turned to causation.

Just and equitable treatment (FET): The Award concludes in para. 709 that (i) "Claimant has not demonstrated any arbitrary, abusive, or discriminatory conduct on the part of either the bankruptcy trustees or the Czech courts, nor that either the trustees or the Czech courts violated its legitimate expectations regarding the protections afforded by the Czech legal system"; (ii) "[n]one of the acts by the bankruptcy trustees and the courts amounted to denial of justice;" and (iii) "[t]he FET standard in this BIT does not include an additional obligation to ensure a fully effective remedy against all harm…". I agree with conclusion (ii) that there was no denial of justice in this case. My view differs, however, with respect to conclusions (i) and (iii).

Conclusion (i) lists some elements, such as abusive, arbitrary or discriminatory conduct, or undermining the investor's legitimate expectations, which – if proven – would constitute unjust and inequitable treatment. But these are not the only elements of the FET standard. Article 2(1) of the BIT requires that Respondent "in all cases afford investments just and equitable treatment." This standard cannot be reduced to a list of types or categories of conduct. The treaty standard remains just and equitable treatment.[1] To determine what is just and equitable, and what is unjust and inequitable, requires an assessment of the overall treatment afforded to the investor, rather than an assessment of each individual act or omission. If the overall result of such treatment is unjust or inequitable, the FET protection will have been breached.

A violation of the BIT could result from the combination of administrative actions (such as those of the bankruptcy trustees) and the failure of the judiciary to correct them even though none of the administrative actions or the court decisions, taken separately, would rise to the level of a breach of FET. The totality of the acts and omissions of a respondent, the whole course of a respondent's conduct, including the decisions of its court, may well result in a finding of a treaty violation.[2] The relevant question, therefore, should be whether the conduct of the bankruptcy trustees and the courts as a whole resulted in treatment that was unjust or inequitable. I conclude that it did.

In the end the Czech courts sided with Claimant. As the Award rightly observes in para. 703, "in the end, Claimant was adjudged to be right in its claim of ownership, but this vindication came too late for it to regain possession and control of the aircraft." None of the individual decisions of the bankruptcy trustees or the Czech courts may have been incorrect as a matter of Czech law. However, the treatment of Claimant (the combination of the acts or omissions of the bankruptcy trustees and the courts), resulted in an outcome that was unfair to Claimant. At different times different courts ruled that the aircraft should be

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[1] *See JKX Oil v. Ukraine*, Award, 6 February 2017 (Crawford, Hanotiau, Reisman), paras. 444-445.

[2] *See RosInvestCo. UK v. Russian Federation*, Final Award, 12 September 2010 (Böckstiegel, Lord Steyn, Berman), para. 280; *AlGhanim v. Jordan*, Award, 14 December 2017 (McLachlan, Fortier, Kohen), para. 365.

included in, or should be excluded from, the bankruptcy estates; the sale of the aircraft without Claimant's consent was sometimes allowed and sometimes prohibited. At the end of this long saga, Claimant prevailed; its rights were, in the end, vindicated, but it was too late – Claimant had lost the asset. This treatment, as a whole, is hardly just and equitable.

Conclusion (iii) focuses on the absence of an explicit requirement (present in other BITs) that the judiciary must provide an effective remedy from the actions of State organs and declines to read into the BIT such a requirement. The absence of such an explicit requirement, however, does not mean that an investor left without an effective remedy is treated justly and equitably, as required by Article 2(1) of the BIT.

In this case, the Czech courts eventually ruled that the aircraft should not have been included in the bankruptcy estates. The aircraft were included in the bankruptcy estates, in the first place, by the bankruptcy trustees, whose actions were attributable to Respondent. After a lengthy process, that inclusion was "undone" by the courts as a matter of Czech law; Claimant, however, remained without a remedy – Claimant received the sale value of the aircraft, which Claimant argues was significantly less than the value at the time of the sequestration. Thus, Respondent did not provide an effective remedy for its own actions, which cannot be just and equitable.

Valuation: In sum, my conclusion is that Respondent is liable for breaches of the BIT. Where Claimant's case may fall is on valuation.

It is Claimant's burden to prove that the value of the aircraft at the time of the sequestration in the fall of 2005 was substantially higher than the amount it received after the sale. I have some difficulties with Claimant's arguments on this point. First, it seems unclear why there would be separate claims for actual damages and future lost profits, as Claimant appears to argue in its written submissions, given that the price of an arms-length transaction (such as the sale of the aircraft) would typically include the asset's revenue-generating potential. At the hearing, Claimant appeared to argue that its damages claim consisted of the lost profits and the residual value of the aircraft (Transcript, pages 121-122), which I believe to be a reasonable argument. Yet, it still leaves open the question why the sale of the aircraft (presumably a "willing seller – willing buyer" transaction) would not capture both the expected future profits and any residual value.

Second, Claimant relies on several documents for the value of the aircraft at or around the time of the sequestration, which do not appear to fully support its claims. One example is the Euro-Trend report (Exhibit C-49), on which Claimant relies to assert a value of $27.2 million as of June 2006 (Amended Statement of Claim, para. 617). However, that report acknowledges that it is based on several untested assumptions. Further, the report appears to calculate the value of the aircraft within a range of $20.1 - $22.4 million (Exhibit C-49, page 22), rather than the $27 million asserted by Claimant, and also states that an amount of almost $5 million would be needed for maintenance before recommissioning the aircraft (pages 22-23). Finally, the report values the aircraft rather than Claimant's interest in them and assumes that Claimant's ownership was free from any liens. There is also a serious question as to whether Claimant has met its burden to rebut Respondent's criticism of

Claimant's reliance on this report and on other similar reports and purchase offers (Statement of Defense, paras. 481-492).

In sum, a careful analysis of Claimant's arguments on valuation may lead to the conclusion that Claimant did not meet its burden to prove the existence of harm and to quantify it.

Washington, May 11, 2020

Stanimir A. Alexandrov