School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: Recofi SA v. Socialist Republic of Vietnam, Ruling No. 4A_616/2015 of the Swiss Federal Supreme Court, dated September 20, 2016 (*rendered in French*)[1]

Case Report by: Sergey Alekhin**, Editor Ignacio Torterola***

Summary: In its September 20, 2016 Ruling, the Swiss Federal Supreme Court refused to set aside an Award in a UNCITRAL investment arbitration between Recofi SA, a French company, and the Socialist Republic of Vietnam under the France-Vietnam BIT dismissing the case for lack of jurisdiction *ratione materiae*. In essence, the Federal Supreme Court validated the interpretation by the Tribunal of the BIT, highlighting that it cannot lightly ignore the definition of investment given by three experienced arbitrators. The Court also pointed out that it cannot second-guess the application of the Tribunal's definition of investment to the facts of the case. Furthermore, the Court rejected Recofi's due process complaints on the allegedly improper application of the burden of proof with respect to the *travaux preparatoires* of the BIT (on the record of the arbitration only from the French side). More specifically, the Court deemed that the burden of proof never shifted to Vietnam, as the French *travaux* of the BIT were not used by the Tribunal to determine *prima facie* jurisdiction. The Court also pointed out that Recofi failed to request the Tribunal to order Vietnam to produce its own *travaux* of the BIT. Finally, the Court ordered Recofi to pay CHF 250,000 of costs and court fees.

Main issues: jurisdiction *ratione materiae*, definition of "investment", France-Vietnam BIT, *travaux preparatoires*, burden of proof, set-aside proceedings, scope of review.

Judges: Christina Kiss; Kathrin Klett and Martha Niquille

Arbitrators in the underlying arbitration: Bernard Hanotiau (Chairman), Stanimir Alexandrov (Claimant-appointed), J Christopher Thomas QC (Respondent-appointed)

[1] The Ruling is anonymized. The identity of claimant, Recofi SA, was disclosed by Global Arbitration Review (*see* Alison Ross (Global Arbitration Review), "Swiss court agrees French trader had no investment in Vietnam," dated October 17, 2016 [available at: http://globalarbitrationreview.com/article/1069403/swiss-court-agrees-french-trader-had-no-investment-in-vietnam]) and Investment Arbitration Report (*see* Jarod Hepburn, "Local court affirms UNCITRAL Tribunal's dismissal of Vietnamese BIT claim centered on unpaid invoices for cross-border sale," dated October 13, 2016 [available at: http://www.iareporter.com/articles/local-court-affirms-uncitral-tribunals-dismissal-of-vietnamese-bit-claim-centered-on-unpaid-invoices-for-cross-border-sales/]).

Claimant's Counsel:

Swiss set-aside proceedings: Girgio Campá (Étude de Me Giorgio Campá, Geneva)

Underlying arbitration: Eric Teynier (Teynier Pic & Associés, Paris)

Respondent's Counsel:

Swiss set-aside proceedings: Thomas Sprecher (Niederer Kraft & Frey, Zurich)

Underlying arbitration: Markus Burgstaller (Hogan Lovells, London)

* Directors can be reached by email at: ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Sergey Alekhin is an associate at Derains & Gharavi specialized in international arbitration, registered with the Paris and Voronezh (Russia) bars. He has acted in proceedings conducted under the Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce Centre (ICC), International Centre for Settlement of Investment Disputes (ICSID) as well as in ad hoc proceedings, including under the UNCITRAL Rules. Sergey obtained a Master double-degree in Law and Economic Globalization from Sciences Po Paris and the University of Paris I Panthéon Sorbonne, a Master Degree in Law from the Russian Academy of State Service, and a Specialist Degree in International Relations from the Voronezh State University (Russia). He is a member of the ICC Young Arbitrators Forum (YAF), and the LCIA Young International Arbitration Group (YIAG).

*** Ignacio Torterola is co-Director of International Arbitration Case Law (IACL) and a partner in the International Arbitration and Litigation Practice at GST LLP in Washington, DC.

Digest:

1. Background to the underlying arbitration

Between 1986 and 1998, Vietnam suffered an economic and food crisis, and was subject to an embargo and other sanctions imposed by the United States. During that period, Recofi SA, a French trading company, concluded multiple contracts with both private and State-owned Vietnamese companies for supply of food, basic commodities and agricultural equipment. In mid-1991, Recofi also opened a permanent representative office in Ho-Chi-Minh City for administrative and coordination purposes.

Recofi deemed that it did not receive full payment on some of the contracts. Accordingly, in July 2013 it initiated a UNCITRAL investment arbitration proceedings against Vietnam under the France-Vietnam BIT, claiming over USD 66 million in compensation. Geneva was selected as the seat of arbitration.

2. Tribunal's Award dismissing jurisdiction

Following Vietnam's objections to jurisdiction for lack of investment, the Tribunal bifurcated the proceedings in April 2015. After a June 2015 hearing in Singapore, the Tribunal rendered

its Award on 28 September 2015, dismissing the case for lack of jurisdiction *ratione materiae*, i.e. lack of an "investment" in the sense of Article 1 of the BIT.[2]

As a preliminary matter, the Tribunal observed that the burden of proof with respect to jurisdiction shifts from Recofi to Vietnam, only after the former establishes *prima facie* jurisdiction (¶ 3.2.1).

The Tribunal then proceeded with its analysis of the term "investment" in Article 1(1) of the BIT on the basis of Art. 31(1) of the Vienna Convention requiring a treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. To the Tribunal, the definition of "investment" was one of the most unsettled issues in investment arbitration. The Tribunal therefore saw its mission as follows: to interpret the term "investment" as used in the BIT in question, without regard to other BITs and without being bound by previous cases (especially from other fora, such as ICSID) (¶3.2.2).

---

[2] Article 1 of the BIT reads, in relevant part:
"*For the purpose of this agreement:*
1. The term 'investment' means assets, such as goods, rights and interest of whatever nature, and in particular though not exclusively:
a) Movable and immovable property as well as any other right in rem such as mortgages, liens, usufructs, pledges and similar rights;
b) Shares, premium on share and other kinds of interest, including minority or indirect forms, in companies constituted in the territory of one Contracting Party;
c) title to money or debentures, or title to any performance having an economic value;
d) intellectual, commercial and industrial property rights (such as copyrights, patents, licenses, trademarks, industrial models), technical processes, trade names and goodwill;
e) Rights derived from any concession conferred by law or by contract, especially concessions relating to prospecting, cultivation, extraction or exploitation of natural resources, including those situated in maritime areas falling under the jurisdiction of either Party, provided that such property must be invested in accordance with the law of the Contracting Party in whose territory or in whose maritime areas the investment has been made, before or after the entry into force of this Agreement.
Any alteration of the form in which assets are invested shall not affect their classification as an investment, provided such alteration is not contrary either to the law of the State in whose territory or in whose maritime areas the investment is made" (free translation from French, formatting as in original).

The original version reads as follows:
"*Pour l'application du présent accord:*
1. Le terme «investissement» désigne des avoirs tels que les biens, droits et intérêts de toutes natures et, plus particulièrement mais non exclusivement :
a) Les biens meubles et immeubles, ainsi que tous autres droits réels tels que les hypothèques, privilèges, usufruits, cautionnements et droits analogues ;
b) Les actions, primes d'émission et autres formes de participation, même minoritaires ou indirectes, aux sociétés constituées sur le territoire de l'une des Parties contractantes ;
c) Les obligations, créances et droits à toutes prestations ayant valeur économique ;
d) Les droits d'auteur, les droits de propriété industrielle (tels que brevets d'invention, licences, marques déposées, modèles et maquettes industrielles), les procédés techniques, les noms déposés et la clientèle ;
e) Les concessions accordées par la loi ou en vertu d'un contrat, notamment les concessions relatives à la prospection, la culture, l'extraction ou l'exploitation de richesses naturelles, y compris celles qui se situent dans la zone maritime des Parties contractantes, étant entendu que lesdits avoirs doivent être ou avoir été investis conformément a la législation de la Partie contractante sur le territoire ou dans les zones maritimes de laquelle l'investissement est effectué, avant ou après l'entrée en vigueur du présent Accord.
Toute modification de la forme d'investissement des avoirs n'affecte pas leur qualification d'investissement, à condition que cette modification ne soit pas contraire à la législation de la Partie contractante sur le territoire ou dans les zones maritimes de laquelle l'investissement est réalisé."

Although Recofi argued that its operations are "investments" as they fall within the category of "*title to money or debentures, or title to any performance having an economic value*" (Art. 1(1)(c) of the BIT), the Tribunal deemed that investments protected by the BIT should be made in the territory of the host state. The Tribunal based itself on Art. 1(1)(e) of the BIT (which included the territorial nexus requirement), arguing that the section should be read in its entirety, and the requirement therefore be applicable to the entire definition of investment. An interpretation to the contrary would, in the Tribunal's view, be contrary to the text, object and purpose of the BIT. It would also run contrary to the Preamble of the BIT, reflecting the intention of the Parties to create favorable conditions for French investments in Vietnam, and vice-versa, and to stimulate the transfer of capital and technology between the Parties (¶3.2.2.).

As to the French *travaux preparatoires* that Recofi produced, the Tribunal deemed them insufficient in view of the absence of Vietnamese *travaux*. In any event, the Tribunal added, the French *travaux* actually confirm the requirement for a territorial *nexus* of the investments and their legality with host State law. The *travaux* were deemed by the Tribunal to be a supplementary means of interpretation of the BIT as per Art. 31(2) of the Vienna Convention, the application of which was not triggered as the ordinary meaning of the treaty was clear, and therefore interpretation limited to principles set out in Article 31(1) of the Convention (¶3.2.2).

Applying the above interpretation of the BIT's definition of investment to Recofi's case, the Tribunal decided that: (i) there was no transfer of capital, know-how or technology from Recofi to Vietnam, most of the activities being carried out outside of the host state, (ii) Recofi's representative office in Ho Chi Minh City performed only administrative activities, (iii) Recofi's assertion that it participated in a food aid program was not backed up by any evidence, and (iv) Recofi's plans for a construction of an abattoir and a freezing unit did not materialize. Accordingly, Recofi's activities did not quality as "investment" under Art. 1(1) of the BIT (¶¶3.2.3-3.2.4).

3. Swiss Court's Analysis of the Award

3.1. Procedural background of the set aside proceedings and preliminary observations by the Court

In November 2015, Recofi initiate set aside proceedings in Switzerland (Geneva being the seat of the underlying arbitration) under Articles 190(2)(b) and 190(2)(d) of the Swiss Private International Law Act ("Swiss PIL Act").[3] The parties exchanged written positions between November 2015 and June 2016, following which the Court rendered its Ruling on September 20, 2016.

[3] Article 190(2) of the Swiss Private International Law Act provides:
"*2. The award may only be annulled:*
(a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
(b) if the arbitral tribunal wrongly accepted or declined jurisdiction;
(c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
(d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
(e) if the award is incompatible with public policy."

After citing the main provisions of the BIT, summarizing the facts of the underlying matter, the underlying arbitration, its outcome, and the procedural history of the set aside proceedings initiated by Recofi (¶¶A-C), the Court began the legal analysis by confirming that the request for set aside is admissible (¶2). It then proceeded with an evaluation of the two set-aside grounds raised by Recofi, namely (a) erroneous finding by the Tribunal of a lack of jurisdiction (Art. 190(2)(b) of the Swiss PIL Act); and (b) violation by the Tribunal of the principle of equal treatment of the parties (Art. 190(2)(d) of the Swiss PIL Act).

3.2. Deferral to the Tribunal's position on definition of investment

In the set-aside proceedings, Recofi argued that the Tribunal incorrectly decided that it lacks jurisdiction, and that it should have interpreted the BIT broadly, in line with prior case law and the French *travaux*, instead of imposing a requirement of a territorial nexus and according great weight to the BIT's preamble (¶3.3).

Yet, the Court sided with the Tribunal's preference for an isolated analysis of the BIT, noting the unsettled nature of the definition of "investment," and the differences between legal and economic notions of this term. The Court further emphasized the fact that the BIT was unanimously interpreted by three experienced arbitrators, which the Court cannot ignore (¶3.4.1).

The Court further deemed the Tribunal's reliance on the Preamble to be in line with Art. 31(1) of the Vienna Convention, as the Tribunal simply emphasized the importance of the territorial nexus requirement (already in the text of the BIT), rather than creating such a requirement. Furthermore, the Tribunal's inquiries into the transfer of know-how, capital and technology were an attempt to verify whether the territoriality requirement was fulfilled in the case at hand, rather than establishing a supplemental requirement to the term of "investment." As to the French *travaux*, the Court also agreed with the Tribunal in that their value was negligible given the lack of *travaux* from the other side, e.g. Vietnam (¶3.4.2).

Finally, with respect to the application of the tribunal's definition of "investment" under the BIT to the facts at hand, the Court decided that it cannot review the fact-based portions of the award, a matter well-settled in Swiss codified law and jurisprudence (¶¶ 3.1.2 and 3.4.3)

Recofi's claim under Art. 190(2)(b) of the Swiss PIL Act was therefore dismissed.

3.3. No due process violation by the Tribunal in relation to the BIT's *travaux*

Recofi's second argument was that the Tribunal improperly applied the burden of proof in the underlying arbitration, by which Recofi's right to be heard was violated. In Recofi's view, the *prima facie* jurisdiction was established by the French *travaux preparatoires* and it was thereafter for Vietnam to contest the jurisdiction of the Tribunal. Rather, the Tribunal expected Recofi to produce the Vietnamese *travaux*, which was impossible for Recofi due to French foreign policy regulations (¶4.1)

Vietnam's objection in that Recofi waived its right to raise an alleged due process violation by not bringing it up in the underlying arbitration was dismissed by the Court, as Recofi's concern was not with the conduct of the proceedings, but rather the purported position of the Tribunal in the Award (¶¶4.1-4.2).

As to Recofi's argument, the Court first noted that in line with Swiss case law, the rules on burden of proof are not part of substantive public policy under the Swiss PIL Act. Regardless, the Court deemed that the Tribunal did not invoke the French *travaux* to find *prima facie* jurisdiction, but rather referred to them to confirm its interpretation of the term "investment" under the BIT. The Court finally added that Recofi never requested the Tribunal to order Vietnam to produce its *travaux* on the BIT, and accordingly the lack of these documents in the arbitration record cannot be reproached to the Tribunal or Vietnam (¶¶4.3.1-4.3.2).

Recofi's claim under Art. 190(2)(d) of the Swiss PIL Act was therefore also dismissed. The Court ordered Recofi to pay CHF 250,000 of costs and court fees.