Swiss Supreme Court rules on the notion of "investment" in bilateral investment treaties

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In *decision 4A_616/2015*, the Swiss Supreme Court considered whether to set aside a jurisdictional award in an investment treaty arbitration conducted under the UNCITRAL Arbitration Rules 1976.

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Speedread

In a French-language decision, dated 20 September 2016, the Swiss Supreme Court refused to set aside an investment treaty award rendered under the UNCITRAL Arbitration Rules 1976 by an ad hoc tribunal seated in Geneva.

In the underlying arbitral proceedings, the claimant (a French corporation) had requested compensation for losses, incurred in the context of contractual relationships with several Vietnamese enterprises of the defendant, the Socialist Republic of Vietnam. The tribunal declined to exercise jurisdiction for lack of an "investment" under the applicable France-Vietnam bilateral investment treaty. It also rejected claims that its application of the rules on burden of proof had violated the claimant's right to be heard.

The Swiss Supreme Court confirmed the tribunal's decision and rejected the claimant's application to set aside the award. (*Decision 4A_616/2015.*)

Background

Article 1(1) of the France-Vietnam ***bilateral investment treaty*** *(www.practicallaw.com/4-502-2491)* (BIT) (1992) defines "investment" as, among others, claims to money or to any other performance of an economic value ("*les obligations, créances et droits à toutes prestations ayant valeur économique"*).

Article 31 of the ***Vienna Convention on the Law of Treaties 1969*** *(www.practicallaw.com/2-383-1230)* provides:

> (1) A treaty shall 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.
>
> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> (3) There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> (4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 190(2)(b) of the Private International Law Act (PILA) permits the initiation of set aside proceedings where the tribunal has wrongly accepted or declined jurisdiction.

Article 190(2)(d) of the PILA permits the initiation of set aside proceedings where the right of the parties to be heard is not observed.

Facts

Between 1986 and 1998, and against the background of US trade sanctions against Vietnam, the claimant entered into a series of contracts relating to the supply of food products and agricultural machinery with both private and state-controlled Vietnamese companies. In 1991, the claimant opened a permanent representative office in Ho Chi Minh City.

In 2013, the claimant initiated arbitration proceedings against the defendant, claiming outstanding contractual payments in the amount of approximately USD 66 million. The claimant alleged that the France-Vietnam BIT explicitly recognised "claims to money or to any other performance of an economic value" as "investments". Further, the claimant argued that French legislative materials, as well as numerous decisions rendered by investment arbitration tribunals, confirmed a broad interpretation of the term investment including monetary claims. Finally, the claimant argued that the relevant contracts formed part of the Vietnamese food assistance program, and that its representative office constituted further proof of its presence in Vietnam.

At the defendant's request, the tribunal ordered a bifurcation of the proceedings and, in a preliminary step, examined the question of whether the claimant had indeed effected an investment, pursuant to Article 1(1) of the France-Vietnam BIT. In September 2015, the tribunal issued an award declining jurisdiction for lack of an investment.

In its decision, the tribunal held that the mere fact that monetary claims are included in the non-exhaustive list of protected investments under Article 1(1) of the France-Vietnam BIT is a necessary, but not conclusive condition for establishing the existence of an investment. According to the tribunal, the objective and purpose of a BIT (the furtherance of bilateral economic relations between the parties) requires that the investment occurs in the territory of the other country, and in accordance with applicable national laws and regulations. The tribunal concluded that the claimant had failed to establish, on the facts, the territorial nexus. In addition, the claimant's contractual relationships did not contribute to Vietnam's overall economic development nor did its representative office, which only provided administrative support, constitute a sufficient presence within the host state. Finally, the claimant had, in the view of the tribunal, failed to demonstrate that the disputed contracts formed part of the Vietnamese food assistance program. Therefore, it dismissed the case.

The claimant subsequently applied to the Swiss Supreme Court to vacate the award.

Decision

The Swiss Supreme Court refused to set aside the award.

"Investment"

The Supreme Court first addressed the question of whether the claimant had actually effected an investment in Vietnam.

With reference to Article 31 of the Vienna Convention, the court embarked on a comprehensive interpretation of Article 1(1) of the France-Vietnam BIT (including notably its preamble) and concluded, in line with the tribunal's findings, that the claimant's activities did not constitute an investment in the sense of that BIT. It also dismissed the claimant's argument that French legislative materials justified a different interpretation. The Supreme Court concluded that even if those materials had provided for such a broad interpretation, which in fact they did not, they would only have reflected a unilateral French position. Lastly, the court stressed that the tribunal's interpretation was predicated on specific facts which were beyond its review.

Monetary claims

The Supreme Court rejected the relevance of the claimant's argument that monetary claims had previously been recognised as investments both in legal literature and in arbitral case law. In the absence of an internationally accepted definition of investment, the court suggested that BIT provisions be interpreted on the basis of the individual BIT in question, and not by referencing other investment treaties or (non-binding) arbitral case law. Consequently, the Supreme Court did not consider that the claimant's numerous references to legal literature and arbitral case law, were helpful to the claimant’s case.

Jurisdiction of tribunals

Interestingly, the Supreme Court alluded to the fact that, despite its unlimited discretion to assess the jurisdiction of tribunals, it would not, without reasonable cause, interfere with the jurisdictional decisions of internationally recognised expert arbitrators who rendered a unanimous decision, in particular with regard to the undetermined legal notion of investment.

Right to be heard

The Supreme Court noted that it could not review the tribunal's application of rules on the burden of proof underlying the claimant's challenge based on the right to be heard. This was because the burden of proof does not form part of the Swiss ordre public. Nevertheless, the court commented that the objections raised were not justified as it could not see either a violation of the burden of proof or of the right to be heard.

Comment

Although Switzerland has been, and continues to be, the seat of choice in a number of investment treaty arbitrations, notably in ad hoc cases, it is rare that the Swiss Supreme Court decides cases which are based on BITs.

Many investment arbitrators and legal scholars (at least under the ***ICSID Convention*** *(www.practicallaw.com/5-205-5234)*) advocate a "globalised" notion of investment with a view to fostering uniformity and, thus, predictability in international law. The Supreme Court decided to follow an, "individual" approach and only focused on the interpretation of the particular BIT. More particularly, the Supreme Court held that any interpretation of investment must be based on the applicable BIT in a particular case, and on the concrete intentions and expectations of the contracting parties, which prevail over more general considerations in legal literature and arbitral case law. In the present case, this approach led both the tribunal and the Supreme Court to conclude that the tribunal had no jurisdiction because there was no investment under the France-Vietnam BIT. In reaching this conclusion, the tribunal and the Supreme Court prevented the host state effectively becoming a "guarantor" if companies domiciled in its territory defaulted on contractual payment obligations. While the court's contention that decisions of other tribunals "cannot at all help the claimant" seems a bit sweeping with a view to applying principles of interpretation under international law and the practice of international tribunals in general, it can be expected that the court's approach will nonetheless guide at least other ad hoc investment tribunals seated in Switzerland and faced with the same issue.

From the perspective of states as parties to an investment treaty, the individual approach taken by the Swiss Supreme Court is likely to be welcomed as it safeguards the intentions and expectations of states having concluded their investment treaty.

Finally, the court's remarkable "deference" to the expertise of investment arbitrators, notably with regard to the notion of investment, should be pointed out as this seems to contrast with the approach taken in commercial arbitration, where the Supreme Court applies its full scrutiny regarding jurisdiction without a similar restriction.

Case

Decision 4A_616/2015 (www.practicallaw.com/w-004-1090) (Swiss Supreme Court).

Resource information

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Products: Arbitration (All jurisdictions), PLC Arbitration Email, PLC US Law Department

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