

Plama Consortium Limited v. Republic of Bulgaria (ICSID Case No. ARB/03/24)

Introductory Note

The decision reproduced below with the parties' consent is the first decision rendered under the auspices of ICSID pursuant to Article 26 of the 1994 Energy Charter Treaty (ECT), which deals with the settlement of disputes between an investor and an ECT Contracting Party. It also addresses the interaction between provisions on most-favored-nation (MFN) treatment and investor-State dispute settlement in investment treaties.

On August 19, 2003, the Centre registered a request submitted by Plama Consortium Limited, a company organized under the laws of Cyprus (PCL or the Claimant), for the institution of an arbitration proceeding against the Republic of Bulgaria (Bulgaria or the Respondent). The dispute concerned difficulties encountered by the Claimant in Bulgaria following its purchase of capital in a local joint-stock company, Nova Plama AD, which owns a local oil refinery. The Claimant invoked the ICSID arbitration clause contained in Article 26 of the ECT. Alternatively, the Claimant invoked the ICSID arbitration provision of the bilateral investment treaty signed between Cyprus and Finland, which the Claimant alleged to have been imported into the 1987 bilateral investment treaty between Bulgaria and Cyprus (the BIT) through its MFN provision.

According to the parties' agreement, the Tribunal was to consist of three arbitrators: one appointed by each party and the third, presiding, arbitrator appointed by agreement of the parties or, failing an agreement of the parties, by the ICSID Secretary-General. The Tribunal was constituted on February 10, 2004, and was composed of V.V. Veeder (British national), Albert Jan van den Berg (Dutch national) and Carl F. Salans (U.S. national), who served as the President of the Tribunal.

At the first session of the Tribunal with the parties, the Respondent confirmed its intention to file objections to jurisdiction. The Respondent objected that Bulgaria had not consented to submit the dispute to ICSID arbitration under Article 26 of the ECT. According to the Respondent, Article 26 relates to disputes concerning an alleged breach of an obligation arising under Part III of the ECT (*i.e.*, its Articles 10 through 17). However, it argued that the Claimant had no claims under Part III since Bulgaria had denied the Claimant such advantages whilst the request for arbitration was being registered by

ICSID. Under ECT Article 17(1), each Contracting Party reserves the right to deny the advantages of Part III of the treaty to a company owned or controlled by nationals of a non-Party State, when the company does not have substantial business activities in the Contracting Party involved. The Respondent claimed to have denied such advantages to the Claimant, which it considered a mailbox company without substantial business activities in Cyprus and owned or controlled by nationals of a non-Party State. To summarize, the Respondent argued that an investor to whom Part III advantages had been denied under Article 17 could not have access to arbitration under Article 26 of the ECT. Furthermore, the Respondent argued that it did not consent to ICSID arbitration under the BIT and that the MFN provision contained in the Bulgaria-Cyprus BIT did not encompass dispute resolution.

On February 8, 2005, the Tribunal issued its decision on jurisdiction. The Tribunal found that it had jurisdiction under Article 26 of the ECT. It held that there was an investment, made by an investor in Bulgaria, in the sense of Article 26, and that an allegation of a violation of the ECT was sufficient at the jurisdictional stage, with no need to positively prove actual violations. The Tribunal recalled that under Article 26(3)(a) of the ECT a Contracting Party had given unconditional consent to arbitration, and held that objections based on Article 17 of the ECT could not interfere with the Tribunal's jurisdiction as the right of an ECT Contracting Party to deny Part III advantages to an investor relates to the merits of the case. The Tribunal further considered that the exercise of this right should have no retrospective effect. Turning to the conditions for exercise of the Contracting Party's right under ECT Article 17(1), the Tribunal found that the Claimant had no substantial business activities in Cyprus. The Tribunal nevertheless decided that the determination of whether the Claimant is owned or controlled by nationals of an ECT Contracting State was premature at this stage. It should be highlighted that the factual background of the case is complex and that the Respondent has raised major objections relating to the Claimant's ultimate ownership and control.

The Tribunal further concluded that the MFN provision of the BIT could not be interpreted as providing the Respondent's consent to submitting a dispute under the BIT to ICSID arbitration, since an agreement to arbitrate "should be clear and unambiguous" (para. 198). The Tribunal departed from recent decisions rendered in *Emilio Agustín Maffezini v. Kingdom of Spain*

(ICSID Case No. ARB/97/7)¹ and in *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8).² The Tribunal has concluded that the principle was that “an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them” (para. 223).

Accordingly, the arbitration proceeding has now moved to the merits phase on the basis of Article 26 of the ECT and within the limits set by the Tribunal in connection with Article 17(1) of the ECT.

The decision on jurisdiction in this case was issued in English. The text of the decision on jurisdiction is also posted in PDF format on ICSID’s website at <www.worldbank.org/icsid>.

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¹ See Decision on Jurisdiction, Jan. 25, 2000, available at <<http://www.worldbank.org/icsid/cases/awards.htm>>.

² See Decision on Jurisdiction, Aug. 3, 2004, available at <http://www.asil.org/ilib/Siemens_Argentina.pdf>.