

Telenor Mobile Communications A.S. v.
Republic of Hungary
(ICSID Case No. ARB/04/15)

Introductory Note

The award reproduced below with the parties' consent deals with the question of indirect expropriation and addresses the interaction between provisions on most-favored-nation (MFN) treatment and on investor-State dispute settlement in investment treaties.

On August 2, 2004, the Centre registered the request submitted by Telenor Mobile Communications A.S. (Telenor or the Claimant), a company organized under the laws of the Kingdom of Norway, for the institution of an arbitration proceeding against the Republic of Hungary (Hungary or the Respondent). The dispute concerned a concession granted in 1993 by Hungary to Pannon, a wholly owned subsidiary of the Claimant, to provide GSM mobile telecommunication services together with a range of other services. In 2001, Hungary set up a new telecommunications system whereby certain fixed line operators could become "universal service providers" and would be funded by forced contributions collected by a State fund on the income of all telecommunication providers. Funds were subsequently collected from Pannon's account for the years 2002 and 2003 without any possibility of recourse. The Claimant asserted that the measures taken by the Government of Hungary amounted to an expropriation of Pannon, as it had incurred significant losses which had the same effect as an expropriation. It further claimed that Hungary breached its fair and equitable treatment obligation under the bilateral investment treaty between Norway and Hungary (BIT). For jurisdiction, the Claimant invoked the ICSID arbitration clause contained in Article XI of the BIT. But as this provision was limited to certain categories of disputes, mainly disputes relating to expropriation, the Claimant invoked, alternatively, the MFN treatment provision of the BIT to extend the scope of the jurisdiction of the arbitral tribunal by importing into the BIT the ICSID arbitration clause of another treaty.

The Tribunal was constituted, by agreement of the parties, on April 22, 2005 and was composed of Mr. Nicholas W. Allard, a U.S. national appointed by the Claimant, Mr. Arthur L. Marriott, QC, a British national appointed by the Respondent, and Professor Roy Goode, CBE, QC, a British national, who served as President of the Tribunal, appointed by the two party-appointed arbitrators.

On October 11, 2005 the Respondent filed objections to jurisdiction arguing that the measures taken did not amount to an expropriation, which was, in this case, the sole basis of the Tribunal's jurisdiction under Article XI of the BIT. Further, the Respondent argued that the MFN provision did not incorporate by reference dispute settlement provisions of other treaties.

In its award, the Tribunal found that it had no jurisdiction under Article XI of the BIT. Recalling that pursuant to Article XI of the BIT its jurisdiction was limited to expropriation claims, the Tribunal held that it was evident that the effect of the measures by Hungary, of which Telenor complained, fell far short of the substantial economic deprivation of its investment required to constitute expropriation, *i.e.*, none of Pannon's assets had been seized; Pannon's management had been left in the hands of its Board without governmental interference; the concession agreement remained in full force; Pannon had not been denied access to its assets, its revenues or any of its other resources; Pannon was, and in its annual reports proclaimed itself to be, a highly profitable company whose net income and asset value had increased steadily year by year. Moreover, there was no evidence to suggest any activity on the part of the Hungarian Government that remotely approached the effect of expropriation. Consequently, the Tribunal decided that Telenor failed to adduce a *prima facie* case of expropriation.

The Tribunal further decided that the MFN clause could not be invoked to extend the Tribunal's jurisdiction to other claims than the expropriation claims referred to in Article XI of the BIT. The Tribunal stated four reasons on which its decision relating to the MFN clause was based. Firstly, according to Article 31 of the Vienna Convention on Treaties, a treaty must 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." For the Tribunal, in the absence of language or context to suggest the contrary, the ordinary meaning of "investment shall be accorded treatment no less favorable than that accorded to investment made by investors of any third State," referred to substantive rights in respect of investments, and not to procedural rights. Secondly, the effect of the wide interpretation of the MFN clause was to expose host States to undesirable treaty-shopping by the investor. Thirdly, the wide interpretation would generate both uncertainty and instability. Fourthly, where,

as in the present case, both parties to a BIT, which restricted the reference to arbitration to specified categories of disputes, had entered into other BITs some of which referred all disputes to arbitration, it could be fairly assumed that in the BIT in question the two parties shared a common intention to limit the jurisdiction of the arbitral tribunal to the categories specified. In these circumstances, to invoke the MFN clause to embrace the method of dispute resolution was to subvert the intention of the parties to the basic treaty, which had made it clear that this was not what they wished.

Therefore, the Tribunal concluded that it had no jurisdiction over any of the claims brought by Telenor, and ordered that the cost of the proceeding be borne by the Claimant.

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