
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LIBANANCO HOLDINGS CO. LIMITED

Applicant

v.

REPUBLIC OF TURKEY

Respondent

ICSID Case No. ARB/06/8

ANNULMENT PROCEEDING

DECISION ON APPLICANT'S REQUEST FOR PROVISIONAL MEASURES

Members of the *ad hoc* Committee

Dr. Andrés Rigo Sureda, President

Judge Hans Danelius

Dr. Eduardo Silva Romero

Secretary of the *ad hoc* Committee

Ms. Martina Polasek

May 7, 2012

Representing Applicant

Mr. Robert Volterra

Mr. Stephen Fietta

Mr. Ashique Rahman

Volterra Fietta

London, United Kingdom

Prof. Andreas Lowenfeld

New York, United States

Representing Respondent

Dr. Veijo Heiskanen

Mr. Matthias Scherer

Ms. Laura Halonen

LALIVE

Geneva, Switzerland

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I. Procedure

1. On December 12, 2012, Libananco Holdings Co. Limited (“Applicant”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”) an application for annulment (“Application”) of the award of September 2, 2011 (“Award”) rendered by the Arbitral Tribunal (“the Tribunal”) in the arbitration between Applicant and the Republic of Turkey (ICSID Case No. ARB/06/8) (“Arbitration”).
2. On March 14, 2012, after the *ad hoc* Committee (“Committee”) had been constituted and the proceedings had begun, Applicant filed a Request for Provisional Measures (“Request”).¹ By letter of March 15, 2012, the Committee invited the Republic of Turkey (“Respondent”) to file its observations on the Request by March 23, 2012. Respondent filed its observations as directed on March 23, 2012 (“Observations”).
3. On March 26, 2012, the Committee invited Applicant to file a reply on the Request by April 2, 2012 and Respondent to file a rejoinder by April 9, 2012. Following Respondent’s request for an extension to file the rejoinder due to the Easter holidays, Applicant offered to file its reply earlier, by March 29, 2012. Accordingly, Applicant filed its reply on March 29, 2012 (“Reply”) and Respondent filed its rejoinder on April 9, 2012 (“Rejoinder”).
4. During the first session of the Committee on April 11, 2012, the parties made two rounds of oral submissions on the Request, which were recorded and transcribed.

¹ The full procedural history of the annulment proceeding to date is described in the Committee’s Decision on Applicant’s Request for A continued Stay of Enforcement of the Award of May 7, 2012.

II. Position of the Parties on the Request

1. Applicant's Request

5. Applicant has requested that the Committee order provisional measures under Rule 39 of the Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”). Applicant has also referred to Rule 53 which provides that, *mutatis mutandis*, the Arbitration Rules shall apply to any procedure relating to the annulment of an award.
6. According to Applicant, provisional measures are urgently needed “to preserve the [Applicant’s] rights, including the right to due process of law, the right to a fair hearing, the right to confidentiality and legal privilege and, ultimately, the right to prepare and present its case without interference from the Respondent’s illicit espionage.” (Request, para. 5)
7. Applicant argues that “[n]o finding of fact is required on the part of the *ad hoc* Committee to issue the Orders set out in Section IV below. The requested provisional measures are derived directly from the findings of fact and determinations made by the Tribunal in the underlying arbitration. It was on the basis of those determinations that the Tribunal based its own Orders restraining the Respondent. The Claimant requests that the *ad hoc* Committee merely reproduce those Orders, modified only to reflect the fact that this is now the annulment phase”. (Request, para. 2)
8. Applicant states that Respondent conducted illicit espionage of Applicant, its representatives, its counsel, witnesses and experts in the underlying arbitration (“the espionage activities”), and used it for the purposes of the Arbitration. Hence, the orders issued by the Tribunal on May 1, 2008 (“the 2008 Orders”). Applicant further states that Respondent continued its illicit espionage in violation of the Tribunal’s orders and that there is no evidence that Respondent has ceased its illicit espionage of Applicant.

9. Applicant contends that, in view of “the compelling evidence and the nature of the rights which are at risk, it is a matter of urgency that the ad hoc Committee recommend the requested provisional measures.” (Request, para. 19) Furthermore, Applicant asserts that the measures are necessary to prevent harm or prejudice to Applicant. According to Applicant, the standard to be applied is a standard of reasonableness and it argues that “[i]t is reasonable to conclude that, in the absence of restraint on the Respondent, the [Applicant’s] right to a fair trial, guaranteed in the Convention and under international law, will be irreparably damaged.” (Request, para. 20)

2. Respondent’s Observations

10. Respondent argues that, contrary to the understanding of Applicant, there is no basis in the ICSID Convention for the Committee to order provisional measures in an annulment proceeding. According to Respondent, the relevant article is Article 52(4) of the Convention, which does not include Article 47 in the list of provisions applicable *mutatis mutandis* to proceedings before the Committee. Respondent contends that “the power of an annulment committee to order stay of enforcement is *lex specialis* to the annulment regime and the only provisional measure available to it.” (Observations, para. 83) Respondent takes the position that an ICSID *ad hoc* annulment committee has no power to “reproduce” automatically the provisional measures recommended by the arbitral tribunal in the underlying arbitration. (Observations, para. 85)
11. In any case, Respondent further argues, Applicant has not produced any evidence in support of its Request and the provisional measures ordered by the original Tribunal lapsed with the issuance of the Award. Respondent thus pleads that the Request be dismissed with costs.

3. Applicant's Reply

12. In Applicant's Reply, it questions the analysis of the ICSID Convention by Respondent and argues that Article 52(4) does provide for the application of Article 44 of the Convention *mutatis mutandis* to annulment proceedings. According to Applicant, Article 44 "allows the Committee to refer to the Arbitration Rules to determine any question of procedure, including the question of whether it has the power to recommend provisional measures." (Reply, para. 32) Applicant contends that "it would be a procedural and substantive absurdity if an ICSID tribunal were able to order certain behavior pending the outcome of the case but an ICSID ad hoc Committee were not able to do so whilst the outcome of the case was still pending." (*ibid.*)
13. Applicant insists on the necessity and urgency of the measures requested based on the evidence submitted in the underlying arbitration and the additional evidence of "the Respondent's illicit espionage of the underlying arbitration in the Request for Provisional Measures." (Reply, para. 34) Applicant requests that the Committee draw all of the appropriate negative inferences from Respondent's failure to provide any assurance and concludes with pleading that the Committee recommends the requested measures in order to safeguard its fundamental procedural rights.

4. Respondent's Rejoinder

14. Respondent in the Rejoinder reiterates its argument that annulment committees have no power to order interim measures because Article 52(4) of the ICSID Convention "expressly excludes Article 47." (Rejoinder, para. 29) According to Respondent, "[i]f any of the ICSID Rules, or Articles in Section IV of the Convention, could be reimported into annulment proceedings via Article 44, even though they have been expressly excluded by Article 52(4), the exclusion would be deprived of any *effet utile*. This cannot be right. The specific exclusion in Article 52(4) must prevail over the general provision in Article 44." (Rejoinder, para. 32)

III. Analysis of the Committee

15. The Request gives rise to the question of whether the Committee has competence to recommend provisional measures. The fact that Article 52(4) of the ICSID Convention does not refer to Article 47 of the Convention provides considerable support for the view that the Committee has no such competence. Moreover, it is at least doubtful whether the general reference in Article 44 of the ICSID Convention to the Arbitration Rules, as read together with Rules 39 and 53 of the Arbitration Rules, is sufficient to provide the Committee with such competence despite the absence in Article 52(4) of a reference to the specific Article dealing with provisional measures.
16. However, the Committee notes that a determination of this question of interpretation of the ICSID Convention will only be necessary if the circumstances are such that, assuming the Committee's competence, they would justify granting the request for provisional measures. The Committee considers in this regard that a decision recommending provisional measures could not be issued unless Applicant has established the need for such measures in order to preserve its rights in the proceedings before the Committee.
17. However, Applicant, while relying on occurrences and findings during the proceedings before the Tribunal, has adduced no elements relating to the present situation but has affirmed that no new findings of fact are needed for the Committee to re-issue, *mutatis mutandis*, the 2008 Orders. The Committee cannot find it established that the present situation is the same as that which caused the Tribunal to issue a decision on provisional measures. Without evidence that Respondent is at present engaging in activities harmful to Applicant's procedural rights or interests, or that Respondent is likely to engage in such activities in the course of the further proceedings, the Committee cannot find a sufficient basis for issuing orders identical to those which were issued several years ago by the Tribunal.

18. It follows that it is not necessary to determine the Committee's competence to recommend provisional measures, since in any case Applicant's request for an order on such measures must be dismissed.

IV. Decision

19. For the reasons set forth above, the Committee unanimously decides:
- (a) To dismiss the Request.
 - (b) To reserve its decision on costs related to the Request for a later stage of the proceedings.

On behalf of the Committee

[SIGNED]

Andrés Rigo Sureda
President