International Dispute Resolution &
Anti-Money Laundering Practice

CASECOMMENTARY

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Cypriot Company Files a US $10.1 Billion Claim Against Turkey at ICSID for an Alleged Unlawful Taking of Interests in Two Electric Utility Companies

International Investor-State Arbitration Developments

The arbitration claim filed by Libananco Holdings Co. Ltd. against the Republic of Turkey, which the World Bank's Centre for the Settlement of Investment Disputes (ICSID) has recently registered, raises a host of interesting issues. Although lawyers for Libananco, in their aggressive public statements speak as if an ICSID arbitral tribunal had already been established and decided the case in favor of Libananco, the fact is that the claim has merely been registered under ICSID's relatively low and permissive standard for registration, and the arbitration panel that will hear the case is still in the process of being constituted. For purposes of ICSID registration, generally, the assertions in the claimant's request to ICSID for arbitration are assumed to be true.

Libananco, an obscure Cypriot company, claims that it had an ownership interest in two electric utility companies in Turkey, CEAS and Kepez. Libananco further claims that in 2003 the Turkish Government unlawfully seized and expropriated the facilities and assets of CEAS and Kepez, and Libananco's interest in these companies.

In its request for ICSID arbitration, Libananco states that it has 3 directors, one of them being Ali Cenk Turkkan, a Turkish national who apparently resides in Amman, Jordan. It has been reported in the Turkish press that Mr. Turkkan acts as a proxy for the Uzan family of Istanbul on a variety of matters. Libananco's request to ICSID states, as is widely known, that the Uzans purchased shares in and gained control of Kepez and CEAS in 1993. In its request to ICSID, Libananco states that it acquired CEAS and Kepez stock between October 2002 and May 2003, but does not say from whom or on behalf of whom. According to Libananco, CEAS and Kepez shares began trading on the Istanbul Stock Exchange in 1986. Libananco has not divulged the identity of Libananco's record owners or beneficial owners.

Can Libananco Establish That ICSID Has Jurisdiction?

The *Libananco* case is likely to be divided into a jurisdictional and a merits phase. Libananco will have the burden of proving that the ICSID arbitral tribunal has jurisdiction, before it proceeds to the merits. Whether Libananco can indeed establish that an ICSID tribunal has the power to decide this case remains to be seen. Undoubtedly, Turkey will deny Libananco's claims and challenge the ICSID tribunal's jurisdiction.

Aside from the legal objections to jurisdiction available to Turkey, one is struck initially by the implications of Libananco's nationality. Given the long-standing, strained relations, and animosity between Turkey and Cyprus, it is somewhat odd from an investment/political risk or ease-of-doing-business standpoint that Libananco or Libananco's owners and shareholders would deliberately seek to make a significant investment in electricity

utilities in Turkey through a Cypriot entity such as Libananco – somewhat analogous to investors making an investment in the People's Republic of China through a Taiwanese entity. The rationale or utility that dictated such a course of action will no doubt bewilder the arbitral tribunal and observers of international investor-state arbitration proceedings.

Some of Turkey's Possible Jurisdictional Challenges

Libananco's Standing

In making its case that the arbitral tribunal has jurisdiction, Libananco will have to establish at the outset that it has capacity (*locus standi*) to bring the claim in question. In this regard, Libananco will have to establish, *inter alia*, that it is a *bona fide* Cypriot company and that it is a lawful owner of CEAS and Kepez shares pursuant to applicable Cypriot as well as Turkish corporate and securities laws. With what resources and through what method Libananco acquired the shares of CEAS and Kepez is not disclosed in Libananco's ICSID arbitration request. In asserting that it owns CEAS and Kepez shares, Libananco has not submitted any documentary evidence that normally proves ownership and which can corroborate its share acquisition/ownership claims. The only documentation that Libananco has submitted in this regard is its own self-serving “certification” dated February 2006, signed by its corporate secretary, Latimer (Management Services) Ltd., containing a bare statement that it owns shares of CEAS and Kepez.

Investment

The arbitral tribunal may also wish to know whether Libananco made a genuine investment in Turkey by acquiring the CEAS and Kepez shares. As noted above, Turkey is likely to raise the issue of whether Libananco's claimed acquisitions of shares in CEAS and Kepez were lawful under applicable Cypriot, Turkish, and perhaps other laws.

Also in regard to investment, the issue of whether Libananco's share acquisitions were at arm's length and for value is likely to be raised and examined. In determining whether Libananco's acquisitions of the CEAS and Kepez shares were for value or market value, Turkey will also likely raise the issue of the source and method of funding for Libananco's CEAS and Kepez share acquisitions. Such a challenge could also trigger further scrutiny of the transfers and the acquisitions of the CEAS and Kepez shares pursuant to applicable fraudulent conveyance/transfer and anti-money laundering laws. Additionally, whether the Turkish Government even knew or had reason to know the extent of Libananco ownership in CEAS and Kepez at the time the Turkish Government seized CEAS and Kepez is not known.

In light of the relevant facts, especially the financial condition of the Uzans and Uzan-controlled entities during the relevant time, the arbitral tribunal will likely want to know the identity of the persons who sold or transferred CEAS and Kepez shares to Libananco, their motivations for doing so, the identity of all Libananco shareholders who invested in Libananco, and the identity of Libananco's directors during the relevant period.

Alter-ego, Turkish Nationals v. Turkey

Turkey may also challenge ICSID's jurisdiction on the basis that Libananco is simply an alter-ego and a continuation of the Uzans' ownership and control of CEAS and Kepez; in which case, the tribunal may disregard Libananco and its Cypriot nationality and confirm that the real party (ies) in interest or investors are the Uzans, who are Turkish nationals; and accordingly dismiss the case for lack of jurisdiction. Turkey may argue that the Uzans were on both sides of the transactions in connection with Libananco's acquisition of CEAS and Kepez shares.

Turkey may contend that Libananco and Uzan entities such as Rumeli Elektrik, that own (or owned) shares in CEAS and Kepez are closely related and that they are actually parts of one single enterprise sharing common ownership and control, and that the sole motivation and purpose of transferring CEAS and Kepez shares to Libananco was to be able submit an arbitration request to ICSID. Upon close scrutiny, the *Libananco* case, in reality, could be a case of nothing more than Turkish nationals bringing a claim against Turkey. This conclusion will be buttressed if Libananco made no genuine investment in the CEAS and Kepez shares that it claims to have acquired, and if such an acquisition was for the benefit and at the direction of the transferor or seller of the those shares, and if the transferor of the CEAS and Kepez shares to Libananco, directly or indirectly, owns and controls Libananco.

Turkey's Consent to Arbitration

Another possible ground for Turkey's challenge of ICSID's jurisdiction is on the ground of consent. Libananco contends that Turkey has consented to the arbitration of the case at ICSID. Turkey is unlikely to concede this point. Pursuant to a relevant international accord, the Energy Charter Treaty, it appears that Turkey unconditionally consented to the international arbitration of a dispute with an investor (*e.g.*, Libananco) of another contracting party (*e.g.*, Cyprus), but only if the investor has not submitted the dispute to the courts or administrative tribunals of Turkey.

The dispute giving rise to the claim for which Libananco seeks redress at ICSID appears to have arisen in February 2003. In February 2003, disagreements between CEAS and Kepez and the Turkish Government with respect CEAS's and Kepez's electricity concessions led CEAS and Kepez to initiate court action in Turkish courts of first instance against the Turkish Ministry of Energy. This action seems to have come after several months of discussions and attempts at compromise between CEAS and Kepez and the Turkish Ministry of Energy. In the final analysis, the Turkish courts upheld the validity of the Turkish Government's seizure of CEAS and Kepez. CEAS's and Kepez's institution of court action in Turkey in 2003 could weaken Libananco's argument that all conditions for Turkey's consent to ICSID arbitration are met

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This case has the potential to negatively impact Turkey's political, economic, and financial standing. The prospect of a $10.1 billion award (minimum) against Turkey, the damage to Turkey's reputation and financial credit-worthiness flowing from any such award, and Turkey's principles will ensure her determined and reasoned

defense of the case. Turkey's expected vigorous defense and challenge of the *Libananco* case will add to the growing body of ICSID investor-state jurisprudence.

For more information on The Eren Law Firm and its international arbitration and litigation practice or to learn how The Eren Law Firm may be of assistance to you in protecting your international investment before or after the fact, or defending against claims, please contact our international arbitration and litigation lawyers:

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The Eren Law Firm is currently representing a UK Claimant in an ICSID arbitration against Malaysia.

Prior to the Eren Law Firm, Mr. Eren served at the U.S. Treasury Department's Office of Foreign Assets Control for 7.5 years and thereafter at the Washington office of the world's largest global law firm. Mr. Eren advises banks, other financial institutions, and major corporations with respect to a variety of financial and investment matters, including but not limited to, matters implicating U.S. economic sanctions and U.S. and international anti-money laundering laws. Mr. Eren also advises and represents clients in New York courts, before ICSID, and in other international dispute resolution fora, and also before U.S. Government agencies such as the U.S. Treasury Department, the U.S. Justice Department, and the U.S. State Department.

Mr. Ristau is an internationally-recognized lawyer, professor, and author on international law issues. Mr. Ristau's private practice consists of transnational litigation and international commercial arbitration. He frequently represents foreign governments and international organizations in court. *See, e.g., Republic of Argentina v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). Mr. Ristau has served as a sole arbitrator and as a member of AAA and ICC arbitration panels, and he has chaired an ICC panel in a $200-million transnational commercial dispute. Mr. Ristau also advises clients on a variety of international law matters including but not limited to, sovereign immunity, diplomatic immunity, and international treaties.

Between 1963 and 1981, Mr. Ristau served at the U.S. Department of Justice where he, as the Director of the Office of Foreign Litigation, participated in and supervised all legal actions outside the United States involving the United States. While at Justice, Mr. Ristau also co-authored the U.S. Foreign Sovereign Immunities Act of 1976. Mr. Ristau is the author of a two-volume treatise entitled *International Judicial Assistance, Civil and Commercial*, published by the International Law Institute in Washington and periodically updated. A partial list of Mr. Ristau's cases is available at: http://www.erenlaw.com/ristauselectedcases.htm