Partial Dissenting Opinion

of Robert Volterra

in the matter of

UNCITRAL *ad hoc* arbitration

in Paris

SCC No. 088/2004

EASTERN SUGAR B.V. (NETHERLANDS) v. THE CZECH REPUBLIC

I

1. I am unable to share the conclusions of my fellow arbitrators, with whom it has been a pleasure and an honour to work, set out in paragraphs 274 and 287 of the Award. In those paragraphs, the Award determines that the First and the Second Sugar Decrees, and related conduct[1] of the Respondent, did not violate the *Agreement on encouragement and reciprocal protection of investments between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic of 29 April 1991* (the ***BIT***). Given the significance of the legal issues involved, I feel obliged briefly to set down my opinion in relation to these two decrees.

2. There are two ways in which the conduct of the Respondent can be evaluated. The first is to consider each act in isolation from the others. The second is to consider the acts in totality as a continuous series of related activities dealing with the same subject matter from 2000 onward. The facts as found in the Award require the First and Second Sugar Decrees to be evaluated in both ways.

II

3. The Award concludes, at paragraphs 274, that the First Sugar Decree and related conduct of the Respondent did not violate the BIT.

4. In relation to the First Sugar Decree, the Award notes the following facts:

    i. The Czech Government promulgated the First Sugar Decree "rashly" despite the fact that it had not passed the required enabling legislation. As a result, it was set aside by the courts. [paragraphs 270 and 274]

    ii. The First Sugar Decree was designed with a "feature that was disturbing". [paragraph 259]

    iii. The disturbing feature was the reserve quota element of the decree. [paragraph 261]

    iv. The reserve quota had been "politically established". [paragraphs 263-265]

    v. The reserve quota system in the First Sugar Decree gave the Respondent "full discretion" to allocate the quota. [paragraph 261]

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[1] States are responsible in international law for their omissions in the same way as for their acts. See, for example, the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, Article 2. Reference in this partial dissenting opinion to conduct, acts or activities of the Respondent therefore includes reference to its omissions, where appropriate.

vi. The Respondent allocated the reserve quota so as to open up the otherwise closed cartel of the sugar regime established under the First Sugar Decree to newcomers. [paragraph 265]

vii. The Respondent opening up the otherwise closed cartel to newcomers was "illogical" and "makes no sense". [paragraph 265]

viii. One consequence of the First Sugar Decree and the Respondent's implementation of it was the establishment of a sugar regime that "favoured newcomers who had no record and had no market share". [paragraph 265]

ix. The effect of this discrimination in favour of newcomers was that the First Sugar Decree operated "to the detriment of those who had bought into or fought for their market share and had earned their quota", such as the Claimant. [paragraph 265]

x. The Respondent also implemented the regime established by the First Sugar Decree in such a way that "the newcomers oversold their domestic quota". [paragraph 268]

xi. The First Sugar Decree had "internal inconsistency: It was designed to do one thing, but for political reasons was also doing a bit of the opposite." [paragraph 266]

5. The Award thus finds as fact that:

i. The Respondent variously designed, promulgated and implemented the First Sugar Decree in a rash, disturbing, flawed, illogical and internally inconsistent manner.

ii. Those flaws and internal inconsistencies were deliberate.

iii. At least a number of those flaws and internal inconsistencies were politically motivated.

iv. The regime rashly established by the Respondent in the First Sugar Decree was operated by it deliberately in a discriminatory manner to the detriment of the Claimant.

6. Notwithstanding the above, the Award concludes at paragraph 274 that the First Sugar Decree does not violate the BIT. The legal reasoning of the Award on this issue is contained at paragraph 272:

> "A violation of a BIT does not only occur through blatant and outrageous interference. However, a BIT may also not be invoked each time the law is

flawed or not fully and properly implemented by a state. Some attempt to balance the interests of the various constituents within a country, some measure of inefficiency, a degree of trial and error, a modicum of human imperfection must be overstepped before a party may complain of a violation of a BIT. Otherwise, every aspect of any legislation of a host state or its implementation could be brought before an international arbitral tribunal under the guise of a violation of the BIT. This is obviously not what BITs are for."

7. Paragraph 272 thus sets out the Award's understanding of the relevant international law of foreign investment.[2] It implies that a violation of international law will occur when there is a blatant and outrageous interference by a State in the property rights of a foreign investor. The Award also accepts that a violation can occur when the conduct of a State constitutes less than blatant and outrageous interference in the property rights of a foreign investor.

8. The Award provides no guidance as to what, in international law, constitutes blatant and outrageous interference. The BIT contains no reference to such a standard or threshold. These terms are not terms of art in international law.

9. The Award does, however, identify a threshold of State conduct that must be surpassed before a violation of international law has occurred. According to the Award, at paragraph 272, international law is not violated only because a piece of legislation is flawed or not fully and properly implemented by a State. For a violation to occur the conduct of a State must overstep:

    i. some attempt to balance various interests;

    ii. some measure of inefficiency;

    iii. a degree of trial and error;

    iv. a modicum of human imperfection.

10. These terms are imprecise; they imply a low threshold.[3] However, the Award provides no guidance as to what, in international law, constitutes "some attempt", "some measure", "a degree" or "a modicum". Likewise, the BIT contains no reference to such a standard or threshold. These terms are not terms of art in international law.

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[2] The Award's legal analysis is conceived of in terms of a violation of "a BIT". There is, however, no standard bilateral investment treaty, notwithstanding the fact that many bilateral investment treaties share elements in common.

[3] It is never satisfactory to replace legal analysis with mere reference to a dictionary. However, for an understanding of the ordinary meaning of the word "modicum", it is relevant to note that it is defined by the Oxford English Dictionary as "a small quantity or portion".

11. The Award concludes that the Respondent's conduct in relation to the First and Second Sugar Decrees did not surpass this threshold and thus did not violate the BIT. I am unable to agree with the Award's reasoning or conclusion. The remainder of this partial dissenting opinion will apply the law to the facts of the case as set out in the Award.

III

12. As noted above, the Award holds that the Respondent variously designed, promulgated and implemented the First Sugar Decree deliberately in a rash, disturbing, flawed, illogical and internally inconsistent manner because of political motivations and then operated it deliberately in a discriminatory manner to the detriment of the Claimant.

13. The applicable law is Article 3.1 of the BIT. It provides:

> "Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors."

14. As noted by the Award, the Respondent rashly promulgated the First Sugar Decree notwithstanding the fact that the requisite implementing legislation was not yet in place. The First Sugar Decree was therefore unconstitutional and subsequently overturned by the Respondent's courts. This promulgation violated the obligation of the Respondent, contained in the fair and equitable provisions of Article 3.1 of the BIT, to provide the Claimant with a stable, transparent and predictable legal framework for its investment.[4]

15. There is, of course, no principle or system of "precedence" in international law. This norm applies equally to investment treaties and investment treaty arbitration, which are part of the greater body of public international law. Nonetheless, to the extent that they are based on sound legal reasoning, the decisions of tribunals in prior international law cases, including investment treaty arbitrations, can provide useful insights to subsequent tribunals considering international law issues. I am therefore strengthened in my views when I consider the views taken by tribunals in other investment treaty arbitrations.

16. For example, the tribunal in *GAMI Investments Inc. v. The Government of the United Mexican States* held that the deliberate enactment of unenforceable legislation amounted to an outright and unjustified repudiation of the legal framework.[5] Similarly, the language used in the Award to describe the First Sugar Decree and the Respondent's related activities as "disturbing", "illogical", making "no sense" and so

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[4] The effect in international law of the Czech court judgments is discussed below in section V.

[5] At paragraph 103.

on, is certainly not of a lesser character than that used by the International Court of Justice in the *ELSI* case to describe the international legal standard: "a wilful disregard of the process of law, an act which shocks, or at least surprises, a sense of juridical propriety".[6]

17. The Respondent also impaired the operation, management, use and enjoyment of the investment of the Claimant by way of measures that were unreasonable. Measures that are designed and implemented with a "feature that was disturbing", that are "illogical" and "make no sense", and that have "internal inconsistency", such as the Award describes the First Sugar Decree and the measures taken in relation to it, cannot be reasonable. Indeed, "reasonable" and "illogical" are antonyms.

18. The Respondent also impaired the operation, management, use and enjoyment of the investment of the Claimant by way of measures that were discriminatory. Measures that are politically established and deliberately implemented in favour of domestic investors to the detriment of a foreign investor, such as the Award describes the First Sugar Decree and the measures taken in relation to it, are discriminatory. As the Award notes, the First Sugar Decree favoured newcomers (local investors) to the detriment of the Claimant. That activity by the Respondent was discriminatory. There was no legitimate justification for it; the Award describes it as "illogical" and making "no sense".

19. For the reasons described above, in relation to the First Sugar Decree, the Respondent therefore violated Article 3.1 of the BIT.

IV

20. The Award concludes, at paragraph 287, that the Second Sugar Decree and related activities of the Respondent did not violate the BIT.

21. In relation to the Second Sugar Decree, the Award notes:

    i. "Overall, the Second Sugar Decree had flaws similar to those of the First Sugar Decree". [paragraph 284]

    ii. The Second Sugar Decree introduced two new features, both "contrary to the policy of furthering rationalization." [paragraphs 278 and 279]

    iii. "The disturbing feature of a reserve was now increased, and, moreover, made available to newcomers". [paragraph 285]

    iv. "[N]ew local entrants continued to produce in excess of their quotas, and oversold into the domestic market". [paragraph 280]

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[6] *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (United States of America v. Italy), Judgment, 20 July 1989, ICJ Rep 1989, paragraph 128.

v. "[N]o fines were imposed on the new local entrants for having produced in excess of their quota and oversold on the domestic market". [paragraph 282]

vi. The Second Sugar Decree was based on a proper legislative basis. [paragraph 277]

vii. Nonetheless, "the Second Sugar Decree was struck down by the" Czech courts. [paragraph 281

22. The Award concludes, at paragraph 287, that the Second Sugar Decree and related activities of the Respondent were more offensive in relation to the provisions of the BIT than were the First Sugar Decree and related activities of the Respondent. I agree and therefore conclude, for the reasons described above, that the Second Sugar Decree violated Article 3.1 of the BIT.

V

23. The Respondent attempted to regulate its domestic sugar industry starting from 2000. It passed four sugar decrees between 2000 and 2004. The various relevant decrees and activities of the Respondent constitute a continuous series of related yet fluctuating activities dealing with the same subject matter from 2000 onward. The Award recognises this as a fact, at paragraph 211:

> "As one will see, the Czech Republic first came close to the European Union model, but then moved away from it."

24. Therefore, in addition to the analysis of the First and Second Sugar Decrees as isolated events, the overall effect of these activities on the Claimant's investment as part of a long-term, continuous process must be considered.

25. In addition to the various facts described above, the Award notes the following relevant facts:

i. "[The Claimant] could ... expect in 2000 that its historical quota acquired from December 1994 onward ... would be maintained." [paragraph 242]

ii. From 2000, the Respondent's sugar regime "changed almost from year to year". [paragraph 212]

26. As the Award finds, the Claimant had a legitimate expectation in 2000 that its historical quota would be maintained in absolute terms. For the same reasons, the

Claimant also had a legitimate expectation in 2000 that its quota within the closed cartel of the sugar regime would be maintained in relative terms.

27. As described by the Award, and noted above, this did not occur as of the introduction and implementation of the "disturbing" feature of the "politically established" reserve quota in the First Sugar Decree and its "illogical" and nonsensical use by the Respondent to open the cartel to newcomers. The fair and equitable treatment obligation in Article 3.1 of the BIT protects the Claimant's legitimate subjective expectations.[7] The Respondent therefore violated Article 3.1 of the BIT.

28. As the Award recounts in its description of the facts from 2000, the Respondent's failures to pass requisite implementing legislation for the decrees, the Respondent's courts' striking down of the decrees, the Respondent's deliberate targeting of the Claimant's investment for discriminatory treatment to its detriment, the Respondent's failure to fine the new, local entrants for their violations of the regime, and other activities of the Respondent had as a consequence that the Respondent's sugar regime "changed almost from year to year".

29. An investor is entitled reasonably to expect a legal framework that is stable, transparent and predictable. In *Saluka v. The Czech Republic*, the tribunal held that a foreign investor was entitled to expect that a State:

> "implements its policies *bona fide* by conduct that is, as far as it affects the investor's investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination."[8]

30. International law requires, in relation to the property of foreigners, that States be open to investors about the objectives of government policy, apply their laws equally and even-handedly, and consult openly and impartially in situations where changes are planned to a legal regime. Tribunals applying international law have reached the same conclusions.[9] For example, the tribunal in the *Metalclad* case held that:

> "all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, ... should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.[10]

31. It is not possible to discern, in the Award's account of the facts, conduct of the Respondent that meets the international legal standard. The Respondent failed to provide the Claimant with a stable and transparent regulatory framework for its investment during a significant period of time.

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[7] See, for example, *Tecnicas Medioambientales TECMED SA v. The United Mexican States* at paragraph 163.

[8] *Saluka v. The Czech Republic* at paragraph 307.

[9] See, for example, *Tecnicas Medioambientales TECMED SA v. The United Mexican States* at paragraphs 162 to 163; *Metalclad Corporation v. The United Mexican States* at paragraph 76; *Emilio Agustin Mafezzini v The Kingdom of Spain* at paragraph 83.

[10] *Metalclad* at paragraph 76.

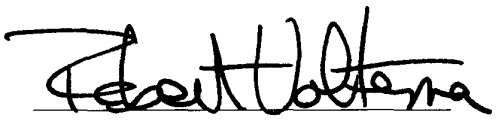
32. It is no defence for the Respondent that the First and Second Sugar Decrees were subjected to the review of the Czech courts. This is not a case, such as *ELSI*, where it is possible to argue that recourse to a court[11] could have overturned an otherwise illegal act and thereby restored the property of the foreign investor. In a situation of expropriation, it may well be that a local court can undo the expropriatory act of another agent of the State or require the State to provide compensation. In the present case, the legal standard at issue is the obligation to provide fair and equitable treatment, not expropriation. Furthermore, there is no obligation to exhaust local remedies in the BIT.[12] The Award considers the judgments of the Czech courts as facts but does not consider them in terms of acts for which the Respondent is liable under Article 3.1 of the BIT. The facts as recounted in the Award confirm that the Czech court rulings contributed to the Respondent's continuing failure to provide the Claimant with a stable and transparent regulatory framework for its investment.

33. For these reasons, the First and Second Sugar Decrees and related activities of the Respondent, considered as a whole and also in combination with the Third and Fourth Decrees and related activities of the Respondent, violated Article 3.1 of the BIT.

VI

34. States have a right to regulate their internal affairs. That includes the regulation of their economic life. If a State's internal regulation violates its obligations under international law, its responsibility is engaged.

35. In relation to the First and Second Sugar Decrees, the Respondent violated Article 3.1 of the BIT. The Respondent's responsibility has been engaged. The Claimant is therefore entitled to compensation for the ensuing damages.



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[11] Reference to a court in this context can include other organs of the State with the power to engage in administrative review. In the *ELSI* case, the first local appeal against the activities of the municipality was to the regional prefecture (see paragraph 32 *et seq.* of that case).

[12] There was a requirement to exhaust local remedies in the *ELSI* case (see paragraph 59 of that case).