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Fakes vs. Phoenix

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The 14 July 2010 Award in *Saba Fakes v. Turkey* (*Fakes*) is notable because it expressly disapproves of the approach taken by the Tribunal in *Phoenix Action v. Czech Republic*, which found in its 15 April 2009 Award that good faith and legality are jurisdictional requirements for access to ICSID arbitration. *Fakes* is a welcome addition to a growing body of investment treaty awards that supports a minimalist approach to the interpretation of investment for the purposes of Article 25, ICSID Convention and that does not consider good faith or legality as jurisdictional requirements under Article 25.

The dispute in *Fakes* arose out of "various investigations and lawsuits brought against the Uzans, a prominent family in Turkey who controlled a vast group of companies in a variety of business sectors including banking, electricity, television and telecommunication." (para. 28) Turkish authorities ultimately froze and sold various assets held directly or indirectly by the Uzans, including Telsim Mobil Telekomunikayson Hizmetleri A.S. (Telsim), a leading Turkish telecommunications company. The Claimant submitted that, as a result of series of share sale agreements, on 3 July 2003 he became the legal owner of 66.96% of the shares in Telsim shortly before the Turkish conduct at issue. He claimed an astronomical US$ 19 billion in damages.

The Tribunal ultimately disposed of the claim on the basis that although there were formal share sale agreements for the Telsim shares, Mr Fakes did not hold legal title over the Telsim share certificates because the parties never had any intention to transfer any rights to Mr Fakes nor did they actually transfer any rights. In coming to this conclusion, the Tribunal highlighted four points. The Tribunal found that the purpose of the arrangement was to use the name of Mr Fakes as "bait" to attract potential purchasers who might be hesitant to deal with the Uzans. Second, the low purchase price (US$ 3,800) could not be reconciled with the acquisition of legal rights to the majority of shares in a major telecommunications company, even assuming the amount was paid. Third, Mr Fakes never obtained possession of the share certificates and was not in a position to obtain possession. Fourth, Telsim appeared to be unaware of the share transfer. The Tribunal concluded that, as the parties did not intend to give effect to the alleged share transfer, there was no investment (para. 147).

In defining investment for the purposes of Art. 25, ICSID Convention, the Tribunal noted that two distinct approaches have been taken by tribunals. On the one hand, some tribunals have identified a number of benchmarks, yardsticks or characteristics that can be used as examples to facilitate the recognition of the objective meaning of investment in any given case. On the other hand, other tribunals have found that an objective definition of investment must include a certain number of elements. The Tribunal noted that some decisions, in addition to the four criteria indentified in *Salini*((i) a contribution, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host State's economic development) had added a fifth criteria (regularity of profit and return) and that *Phoenix Action* had identified two other requirements—that the assets be invested in good faith and in accordance with host State law. The Tribunal then noted that the ever increasing list of criteria has resulted in some tribunals taking the view that the notion of investment is to be viewed solely through the prism of consent and that, as the ICSID Convention does not define investment, consent to arbitrate an investment dispute is based on the definition of protected investment in the underlying treaty.

The *Fakes* Tribunal takes the minimalist middle road in this debate. It affirms that there is an objective definition of investment in the ICSID Convention that cannot be defined simply through the parties' consent (para. 108). Second, it finds that the criteria of (i) contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention (para. 110).

Despite taking a minimalist approach to defining an objective core meaning of investment for the purposes of Art. 25, the approach in *Fakes* diverges from what the 30 July 2009 Award in *Pantechniki S.A. Contractors & Engineers v. Albania*, referred to as an "emerging synthesis", citing Zachary Douglas' formulation in *The International Law of Investment Claims* that: "The economic materialisation of an investment requires the commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return." (Rule 23) In *Fakes*, "a certain duration" is identified as a necessary criterion, while the formulation in Douglas' Rule 23 includes expectation of commercial return but not duration. It is unfortunate that the Tribunal in *Fakes*, in its attempt to set out a definitive test, did not explain in more detail why "a certain duration" is a necessary criterion mandated by the ICSID Convention. Why should an investment that has been in a host State for a hour not obtain treaty protection? This would seen to create a perverse incentive for states to expropriate as soon as possible.

On the issue of the definition of investment generally, I find the reasoning in *Pantechniki* about second-judging state choices persuasive: "For ICSID arbitral tribunals to reject an express definition desired by two States-party to a treaty seems a step not to be taken without the certainty that the Convention compels it." (para. 42) As the ICSID drafters did not decide to define investments, in my view there are very good reasons for the arbitrator to look solely to the instrument of state consent for the definition of investment, absent very compelling reasons.

The *Fakes* Tribunal rightly stated that principles of good faith and illegality cannot be incorporated into the text of the ICSID Convention with doing violence to its language. The requirement to interpret and apply treaties in good faith does not make it a criterion for whether there is an investment for the purposes of the ICSID Convention (para. 112-113). Likewise, although treaty protection might be conditioned on a requirement of legality, the ICSID Convention does not impose this as a jurisdictional requirement (para. 114).

Although the reasoning in *Fakes* with respect to the three necessary criteria for an investment under Art. 25, ICSD Convention is not particularly satisfying, *Fakes* can be commended for providing a succinct and clear rejection of the attempt in *Phoenix Action* to add further and unwarranted jurisdictional requirements for the purposes of ICSID arbitration.

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