IOANNIS KARDASSOPOULOS
AND RON FUCHS v. THE REPUBLIC OF GEORGIA
(ICSID CASE NOS. ARB/05/18 AND ARB/07/15)
AWARD

Case Report by Maria Kostytska**
Edited by Ignacio Torterola ***

An Award rendered on March 3, 2010, under the Energy Charter Treaty ("ECT") and the Georgia-Greece and Georgia-Israel bilateral investment treaties ("BITs"), and in accordance with the ICSID Convention and Arbitration Rules.

Tribunal: Mr. Yves Fortier, C.C., O.Q., Q.C. (President), Professor Francisco Orrego Vicuña, Professor Vaughan Lowe, Q.C.

Claimant’s counsel: Ms. Karyl Nairn, Mr. Timothy G. Nelson, Mr. David Herlihy, Ms. Jennifer M. Cabrera, SKADDEN, ARPS, SLATE, MEAGHER AND FLOM (UK) LLP / SKADDEN, ARPS, SLATE, MEAGHER AND FLOM LLP

Defendant’s Counsel: Ms. Claudia T. Salomon, Mr. Matthew Saunders, Ms. Kate Knox, Ms. Kiera Gans, Mr. Theodore C. Jonas, Mr. Nick Gvinadze, Mr. Avto Svanidze, DLA PIPER UK LLP / DLA PIPER LLP (US) / DLA PIPER GVINADZE & PARTNERS LLP

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Maria Kostytska is an attorney at Winston & Strawn LLP specializing in investor-State arbitration. She can be reached at mkostytska@winston.com or +1-202-282-5841. Ms. Kostytska wishes to thank Kathy Ames Valdivieso, Advisor at Winston & Strawn, for editing the Spanish version of the digest.

*** Ignacio Torterola is co-Director of International Arbitration Case Law (IACL).
INDEX OF MATTERS DISCUSSED

1. Facts of the Case .................................................................................................................................................1
2. Legal Issues Discussed in the Decision ..................................................................................................................3
   (a) Jurisdiction Ratione Temporis (paras. 241-242, 247-249, 258-268) .................................................................3
   (b) Attribution (paras. 273-280) ..............................................................................................................................3
   (c) Scope of Rights (paras. 317-349) ........................................................................................................................3
   (d) Expropriation (paras. 386-408) ............................................................................................................................4
   (e) Fair and Equitable Treatment (paras. 428-452) .................................................................................................4
   (f) Causation (paras. 465-470) ...............................................................................................................................5
3. Decision ....................................................................................................................................................................7
**Digest**

1. **Facts of the Case**

Mr. Ron Fuchs (Israeli national) and Mr. Ioannis Kardassopoulos (Greek national) invested in the Republic of Georgia’s oil and gas sector in the early 1990s following the dissolution of the former Soviet Union. They held equal shares in Tramex International Ltd. (“Tramex”), a Panamanian company, which in 1992 executed a Joint Venture Agreement (“JVA”) with SakNavtobi, a Georgian state-owned national oil company. The JVA created GTI, a joint venture vehicle, owned in equal shares by Tramex and SakNavtobi. The JVA conferred upon GTI the rights to operate, maintain, and construct certain pipelines and refineries and to export oil and gas for 25 years. In 1993, following the restructuring in the Georgian energy sector, the JVA parties executed a Deed of Concession from TransNavtobi, a Georgian state-owned entity holding rights to the oil transportation network in Georgia, granting a 30-year concession over certain pipelines to GTI.

In the mid-1990s, GTI’s rights were terminated as the Government opted to collaborate with Azerbaijan International Operating Company (“AIOC”), a Cayman-Islands incorporated consortium of large oil companies eager to develop the Georgian oil and gas sector on a larger scale. On November 11, 1995, President Shevardnadze adopted Decree No. 477 establishing a new state-owned Georgian International Oil Corporation (“GIOC”) to fulfill “essentially the same aims as GTI.”¹ On February 20, 1996, the Cabinet of Ministers adopted Decree No. 178 conferring upon GIOC substantially the same rights that had previously been granted to GTI, cancelling all rights previously given by the Government and inconsistent with the Decree, and authorizing GIOC to represent Georgia in a contract with AIOC and other companies for the construction and exploitation of a major pipeline.

During the next decade, the investors in GTI unsuccessfully sought to obtain compensation from the Georgian government for the termination of their rights. Chairman of SakNavtobi wrote directly to President Shevardnadze, who ordered the stakeholders to “find a decision acceptable for all the parties” and “[r]eport to [him].”² On April 23, 1997, a compensation commission was established by Order 84 to consider compensation owed to Tramex for the loss of its investment in Georgia. Tramex retained a private company to conduct an independent audit

---

¹ Award ¶ 388.
² Award ¶ 165 (quoting Hearing Bundle, Tab 17).
of Temax’s losses. The company assessed GTI’s losses at approximately US$ 24 million. In 2002, after prolonged delay, the Government released a report, which did not address compensation per se, but rather the legal relationship between SakNavtobi and the Georgian State. Frustrated with the failure of the Georgian government to provide compensation to him and his partner, Mr. Fuchs sought the assistance of Dr. Henry Kissinger and his consulting firm. At the meeting conducted by the consulting firm, the Georgian delegation did not dispute that Georgia had taken away GTI’s rights and that Tramex was therefore entitled to compensation, and the conversation turned to the amount of compensation. Following the meeting, in 2003, President Shevardnadze signed a decree agreeing to an independent audit of the costs incurred by Tramex, and Tramex commissioned another consulting company to conduct the audit. In the meantime, President Shevardnadze resigned as the Rose Revolution gained momentum in Georgia, and Mr. Saakashvili was elected as President. The audit report, presented to the Government in February 2004, evaluated Tramex’s total loss at US$ 106.3 million. However, the new Government established another compensation commission in October 2004. Finally, in a letter dated November 15, 2004, the Government informed Claimants of the commission’s conclusion that the Government was not liable because it was not a party to the agreements concluded with Tramex. The parties to the JVA and the Deed of Concession were SakNavtobi and TransNavtobi, respectively, and they were legal entities distinct and independent from the State and acting on their own behalf. This was “an unequivocal rejection of the Claimants’ demand for restitution” and “a complete denial of any responsibility on the part of the Georgian State[.]

Claimants initiated two separate arbitration proceedings before ICSID. Mr. Kardassopoulos filed a Request for Arbitration on August 2, 2005, asserting claims under the Georgia-Greece BIT and the Energy Charter Treaty (“ECT”). One and a half years later, on August 20, 2007, Mr. Fuchs submitted a Request for Arbitration for breach of the Georgia-Israel BIT arising out of the same set of facts. The Parties sought consolidation of the two proceedings, and it was granted.

---

3 Award ¶ 207.
2. Legal Issues Discussed in the Decision

(a) Jurisdiction Ratione Temporis ( paras. 241-242, 247-249, 258-268)

The Tribunal decided that it lacked jurisdiction *ratione temporis* over Mr. Kardassopoulos’s expropriation claim under the Georgia-Greece BIT. GTI’s early oil rights were expropriated through Decree 178 on February 20, 1996, while the BIT entered into force several months later on August 3, 1996.4 The Tribunal therefore decided the expropriation claim under the ECT.

The Tribunal upheld jurisdiction *ratione temporis* over Mr. Fuchs’ fair and equitable treatment claim pertaining solely to the compensation commission process under the Georgia-Israel BIT. The first compensation commission was established by Order 84 on April 23, 1997, whereas the BIT entered into force approximately two months earlier on February 18, 1997.

The doctrine of equitable proscription did not bar consideration of the claims. The ten-year delay in commencing international arbitration was justified as Claimants had good reasons to suppose that a fair resolution of the dispute could be achieved through the compensation commission process, which Claimants continuously and persistently pursued since 1996.5

(b) Attribution ( paras. 273-280)

Recalling its findings at the jurisdictional phase and relying on the International Law Commission (“ILC”) Articles on State Responsibility, the Tribunal concluded that any acts or omissions of SakNavtobi and/or TransNavtobi are attributable to Georgia.6

(c) Scope of Rights ( paras. 317-349)

Prior to the consideration of liability under the treaties, the Tribunal interpreted the JVA and the Deed of Concession and concluded that they conferred upon GTI “the exclusive rights to possess, use and operate the *early* oil pipeline and

---

4 Award ¶ 241.
5 Award ¶¶ 261, 267.
6 Award ¶¶ 273-280.
related facilities” but did “not grant any immediate rights in future oil and gas pipelines in Georgia.”

(d) Expropriation ( paras. 386-408)

Applying Article 13(1) of the ECT, the Tribunal found that Georgia’s enactment of Decree 178 on February 20, 1996, which deprived GTI of its rights in the early oil pipelines, “present[ed] a classic case of direct expropriation” of Mr. Kardassopoulos’ interest in GTI. The Tribunal set the valuation date about three months earlier on November 11, 1995, when Georgia enacted Decree 477, which established GIOC, an entity “with essentially the same aims as GTI” “to whom GTI’s rights were eventually transferred.”

The expropriation was deemed unlawful on two grounds: first, “failure to carry out the expropriation in accordance with due process”; and second, “continuing failure to pay prompt, adequate and effective compensation.” Because of the dual basis for the finding of the illegality of expropriation, there was no need to address the issue of whether failure to pay compensation alone renders expropriation unlawful. The expropriation was in the public interest as Georgia needed to cooperate with a partner “who could deliver a pipeline solution on a scale required to satisfy the prevailing geopolitical and economic concerns in Georgia in the mid-1990s.” The expropriation was not discriminatory as the measures affected both the foreign and Georgian investors in GTI and benefited another foreign investor.

(e) Fair and Equitable Treatment ( paras. 428-452)

The Tribunal found without hesitation that Georgia failed to afford Mr. Fuchs fair and equitable treatment as required by Article 2(2) of the Georgia-Israel BIT. The Tribunal interpreted the fair and equitable treatment standard in light

---

7 Award ¶ 339 (emphasis added).
8 Award ¶ 387.
9 Award ¶ 388.
10 Award ¶ 408.
12 Award ¶ 392.
13 Award ¶ 393.
14 Award ¶ 451.
of the BIT’s object and purpose of encouraging the inflow and retention of investment, without expressing an opinion as to whether this standard is the same or higher than the customary international law “minimum standard.”

Georgian officials repeatedly assured Mr. Fuchs that compensation would be forthcoming, which gave rise to Mr. Fuchs’ legitimate expectations of being compensated for the cancellation of rights. Through its handling of the compensation process, the Government of Georgia breached Mr. Fuchs’ legitimate expectation of being treated “in a manner that was reasonably justifiable and did not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination.” The Government’s “denial of any responsibility or obligation towards the Claimants”, eight years after the initiation of the compensation process, and despite senior government officials’ indication that the State was responsible for the losses and that some amount of compensation was due, was deemed inexcusable. The fact that the assurances of compensation were given years after Mr. Fuchs made his initial investment in Georgia did not preclude the finding of a breach of the fair and equitable treatment standard.

\((f)\) Causation (paras. 465-470)

There could be “no real question that but for the Respondent’s conduct, the Claimants would not have suffered the loss of their rights.” Whatever contract rights Claimants had were terminated by Decree 178. Any hopes of compensation dissipated upon receipt of the letters from the Government in November-December 2004, “which stated finally that the Respondent had no liability with respect to the claims made by Tramex and that no compensation would be forthcoming.”


The Tribunal’s ruling that the expropriation was unlawful triggered a discussion as to whether a higher amount of reparation is due. The Tribunal accepted

---

15 See Award ¶¶ 428-429.
16 Award ¶ 441.
17 Award ¶ 449.
18 Award ¶ 465.
19 Award ¶ 465.
Claimants’ argument and authorities that “full reparation for unlawful expropriation [may] require damages to be awarded as of the date of the arbitral Award[]” to compensate Claimants “for value gained between the date of the expropriation and the date of the award[].”20 But the higher measure of compensation is appropriate only if Claimants can demonstrate that “but for the taking, [they] would have retained their investment.”21 That was not the case in this arbitration as Claimants likely would have sold their shares in GTI to AIOC in 1995.22 Thus, the causation requirement articulated by the Tribunal rendered the issue of higher damages moot under the facts of the case. The Tribunal therefore found that the appropriate measure of damages for Mr. Kardassopoulos’ expropriation claim was fair market value (“FMV”) of GTI’s rights as of November 10, 1995, when the Government enacted Decree 477 establishing GIOC to fulfill substantially the same purpose as GTI.23 The same measure of damages was applied to Mr. Fuchs’ fair and equitable treatment claim.24

The “stabilization clauses” in the JVA and Deed of Concession did not affect the measure of damages as they did not “cap” damages and contemplated recovery of not only expenses but also of lost profits.25

To calculate the damages owed to Claimants, the Tribunal considered three contemporaneous transactions (or potential transactions), which shed light on the value of the investment on the valuation date. The Tribunal apparently accepted Claimants’ argument that “a completed or seriously contemplated transaction offers the best evidence of an asset’s FMV[]” and rejected Respondent’s approach based on historic expenditures.26 First, the Tribunal considered the expected transit fees payable by AIOC to GIOC, which GTI could have collected but for the cancellation of its rights. Second, the Tribunal looked to the offer extended in 1995 by a private company to purchase a 25% stake in GTI, having conducted due diligence, financial analyses, and cashflow projections. Third, the Tribunal considered a preliminary offer made by another potential buyer in mid-1995. The Tribunal rejected Respondent’s assertion that

20 Award ¶ 514.
21 Award ¶ 514.
22 Award ¶ 515.
23 Award ¶ 517.
24 Award ¶ 537.
25 Award ¶¶ 485, 484.
26 Award ¶¶ 595, 601.
these “valuations are speculative and fundamentally unreliable” and stressed that “[i]t is not common in investment treaty arbitration that a Tribunal has available to it three arm’s-length, contemporaneous transactions (or potential transactions) to assist in valuing the investment, much less three to converse in a narrow range of value, i.e., US$ 28.1 million to US$ 30.6 million.”

Respondent proposed to deduct taxes from the resulting valuation figure. Yet Claimants invoked the most favored nation (“MFN”) clause to avoid a deduction, considering that Georgia permitted the Cayman Islands investor AIOC to operate on a tax-free basis. The Tribunal was open to the possibility that an MFN clause could “operate to secure preferential tax treatment in respect of an investment if such treatment is available to other foreign investors.” But the Tribunal did not need to resort to the MFN clause because even without it, “the tax treatment of the AIOC is a relevant factor in the valuation of GTI” and “no taxes would have been paid.” Thus, the Tribunal rejected the proposed adjustment for taxes.

The Tribunal awarded compound interest to achieve full reparation. The Tribunal also ordered Respondent to pay Claimants’ costs and attorney’s fees, regardless of the fact that a third party was financing the arbitral proceedings on behalf of Claimants.

3. **Decision**

The Tribunal decided that Georgia unlawfully expropriated Mr. Kardassopoulos’ investment in violation of the ECT. The Tribunal also determined that Georgia breached the fair and equitable treatment standard applicable to Mr. Fuchs’ investment under Article 2(2) of the Georgia-Israel BIT. The Tribunal ordered Georgia to pay compensation in the amount of US$ 15.1 million each to Mr. Kardassopoulos and Mr. Fuchs. The Tribunal also awarded compound interest in the amount of approximately US$ 30 million to each Claimant. Georgia was also required to pay Claimants’ cost and attorneys’ fees amounting to approximately $US 7.9 million. Georgia’s total liability added up to approximately US$ 98.1 million.

---

27 Award ¶ 577.
28 Award ¶ 598.
29 Award ¶ 622.
30 Award ¶ 623.