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Franck Charles Arif v Republic of Moldova: *Courts Behaving Nicely and What to Do about It*¹

I. INTRODUCTION

The 2013 Award of the ICSID Tribunal in the case of *Frank Charles Arif v Republic of Moldova* is noteworthy for squarely addressing an important point of international investment law: how to deal with courts behaving nicely?² Or, to put it in more technical terms, how should investment Tribunals approach claims about conduct of domestic courts that, while unobjectionable on its own terms, has the effect of harming the investment by diverging from a position taken by other public authorities in their dealings with the investor? Reasonable people may disagree on whether the Tribunal's answer -- that a State may incur international responsibility for the breach of fair and equitable treatment because of legitimate expectations by investors to consistent behaviour by public authorities -- is the best possible one. Still, the Tribunal is to be commended for posing the right questions in an explicit manner, which should hopefully contribute to development of law on the issue (whether *jurisprudence constante* is eventually formed on the basis of the rationale of *Arif* or on its rejection).³

II. BACKGROUND

Frank Charles Arif, a French national, was an owner of ICS 'Le Bridge Corporation Limited', SRL ('Le Bridge'), a company incorporated in Moldova.⁴ Le Bridge won a tender organised by

¹ *Mr Franck Charles Arif v Republic of Moldova*, ICSID Case no ARB/11/23, Award (8 April 2013) (Professor Bernardo Cremades, President; Professor Bernard Hanotiau; Professor Rolf Knieper).

² An important question for many areas of human activity, see M van Vugt and W Iredale, 'Men Behaving Nicely: Public Goods as Peacock Tails' (2013) 104 *British J Psychology* 104.

³ This case note is limited to discussion of the merits of the *Arif* award, but it bears noting that its discussion of moral damages, *Arif* (n 1) paras 584-615, has been relied upon by *Antoine Abou Laboud et Leila Bounafen-Abou Laboud v DRC*, ICSID Case no ARB/10/14, Award (7 February 2014) (Professor William Park, President; Karim Hafez; Marie-Andrée Ngwe) paras 620, 622; *Quiborax SA and Non Metallic Minerals SA v Bolivia*, ICSID Case no ARB/06/2, Award (16 September 2015) (Professor Gabrielle Kaufmann-Kohler, President; Marc Lalonde; Professor Brigitte Stern) para 618.

⁴ *Arif* (n 1) para 43.

the Government of Moldova for the creation of a network of duty free stores on the border with Romania.⁵ Le Bridge concluded a contract with the Customs Service,⁶ executed lease agreements with four local customs offices, obtained licenses to operate duty free stores, and was ready to open four duty free stores in November 2009.⁷ Le Bridge also signed a lease agreement with a State Enterprise Chisinau International Airport, which was approved by the State Administration of Civil Aviation and the Board of Directors of the State Enterprise; license to operate duty free stores were updated to include the airport.⁸ (The distinction between ‘border stores’ and ‘airport stores’ was important in resolution of the claim.)

In December a competitor brought a case against Le Bridge, the Ministry of Economy and Commerce, and the National Customs Service before Moldovan courts in relation to border stores, seeking to cancel the results of the tender and the four lease agreements with customs offices.⁹ Much judicial to and fro followed in 2009-12. While Moldova’s courts mostly accepted the competitor’s arguments and ordered the cancelation of tender and existing contracts, Le Bridge was granted the right to open a few new stores, and the Supreme Court eventually overturned the unfavourable judgment and sent the case back to lower courts.¹⁰ In November 2009, the same competitor also brought another case against Le Bridge and the Airport State Enterprise in relation to airport stores, seeking to cancel the lease agreement.¹¹ Again, after numerous judicial decisions in 2009-12, domestic courts accepted these arguments, ordering eviction of Le Bridge.¹²

Arif claimed that the conduct of Moldova’s authorities and courts had been in breach of a number of obligations under the 1997 France-Moldova BIT relating to expropriation, specific commitments, fair and equitable treatment, arbitrary and unreasonable measures, discrimination, and denial of justice.¹³

III. MERITS

International law has a robust set of rules for courts not behaving nicely.¹⁴ The problem in *Arif* (to use the word ‘problem’ rather loosely) was that Moldovan courts appeared to be behaving

⁵ Ibid paras 41-3.

⁶ Ibid paras 44-8.

⁷ Ibid paras 50-1.

⁸ Ibid paras 87-92.

⁹ Ibid para 59.

¹⁰ Ibid paras 60-86.

¹¹ Ibid para 93.

¹² Ibid paras 94-124.

¹³ Ibid paras 187-224.

¹⁴ J Paulsson, *Denial of Justice* (CUP 2005).

nicely. Hence the question: when, if ever, will a State incur responsibility under international investment law for decisions of domestic courts in claims brought by private parties in relation to investment? The Tribunal considered this issue from the perspective of several primary obligations. First, had expropriation taken place? The Tribunal was not persuaded that it had, primarily because an investor could not be deprived of rights that were invalid. Contracts had been declared invalid by Moldovan courts, which had been applying Moldovan law legitimately and in good faith.¹⁵ Nor was the investor's argument improved by being rephrased as relating to estoppel. To accept the argument that Moldova was estopped from denying the rights that it had itself granted it 'would inevitably imply that Moldova can be liable at an international level for the correct application by the Moldovan courts of Moldovan law in lawsuits filed by a private competitor'.¹⁶

The Tribunal then addressed denial of justice. It first considered whether an investor could rely on denial of justice under customary international law. Drawing a distinction between customary obligations of denial of justice and obligations under investment protection treaties,¹⁷ it noted 'firstly, that international law allows a free-standing claim for denial of justice and secondly, that such claim can only be successfully pursued by a person that was denied justice through court proceedings in which it participated as a party'. Since *Le Bridge*, rather than *Arif*, had been the party before domestic courts, the claim based on customary law was dismissed.¹⁸ At the same time, these arguments could be considered as part of a fair and equitable treatment claim regarding injury to shareholders' rights,¹⁹ responsibility arising 'if and when the judiciary breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions'.²⁰

The Tribunal proceeded to consider whether the proceedings regarding airport stores had constituted denial of justice. While courts had committed procedural errors, these did not 'amount to such a manifest disrespect of due process that they offend a sense of judicial propriety'.²¹ No substantive denial of justice had been committed either – even if the court's reasoning could have been less formalistic, it could be followed throughout.²² The Tribunal then considered judicial proceedings regarding the tender and border stores.²³ Some aspects of these

¹⁵ *Ibid* paras 415-7. In any event, border stores were still operating and generating considerable revenue, *ibid* para 418.

¹⁶ *Ibid* para 419, see also paras 420-21.

¹⁷ *Ibid* para 423-34.

¹⁸ *Ibid* para 435.

¹⁹ *Ibid* para 436-45.

²⁰ *Ibid* para 445.

²¹ *Ibid* para 447.

²² *Ibid* para 450-54.

²³ *Ibid* paras 455-97.

proceedings did appear to the Tribunal to be problematic or wrong, but the standard of international wrongfulness was never reached: ‘courts did not render decisions that no competent and honest court would have possibly been able to render’,²⁴ ‘there was [not] a general *animus* against [investor’s] business, and .. the judiciary [had not] tried to destroy [its] business in Moldova in general’,²⁵ ‘the error [was not] tainted by impermissible bias and bad faith’,²⁶ and ‘procedures [were] not so void of reason that they breathe bad faith’.²⁷

The Tribunal finally addressed the claim regarding breach of fair and equitable treatment, expressed in Article 3 of the BIT as an obligation ‘to ensure ..., in accordance with Public International Law principles, fair and equitable treatment’. Even though the language of ‘Public International Law principles’ could be read as a reference to customary international law, the Tribunal considered the issue to be ‘increasingly of historic significance’ because of treaty practice accelerating the development of custom, and in any event the particular provision, put in its context and by reference to object and purpose, was imposing ‘an autonomous standard’.²⁸ It then elaborated the content of obligation from the perspective of legitimate expectations, describing them as expectations with ‘an objective basis, ... not fanciful or the result of misplaced optimism’,²⁹ with an identifiable scope and origin,³⁰ which are balanced with the State’s right to regulate,³¹ and may be breached by both substantive changes in policy and treatment of the investor during that process.³² By applying this standard, the Tribunal concluded that ‘[t]he legitimate expectation of the investor of a secure legal framework to operate a duty free store at Chisinau Airport was breached’ because of the inconsistency between the conduct of authorities that endorsed and encouraged the investment, and the conduct of courts that found investment to be unlawful.³³ Conversely, legitimate expectations had not been breached regarding border stores because there had been no expectation of exclusivity, and the investor was not precluded from operating there.³⁴

IV. COMMENTS

²⁴ Ibid para 464.

²⁵ Ibid para 465.

²⁶ Ibid para 470.

²⁷ Ibid para 482.

²⁸ Ibid para 529.

²⁹ Ibid para 532.

³⁰ Ibid para 535.

³¹ Ibid para 537.

³² Ibid para 538.

³³ Ibid para 547.

³⁴ Ibid para 548-55.

The Tribunal's observations in relation to the nature of treaty obligations of fair and equitable treatment and modern developments of customary international law are in line with a significant amount of arbitral decisions and legal writings. It is fair to say that whatever reservations one might have about that position will not be dispelled by the brief reasoning of this award.³⁵ But even if one were to accept the position as correct in general terms, its articulation by the Tribunal does not easily fit within the framework of sources and interpretation. One might take the view that the rule on fair and equitable treatment is 'autonomous' (a term tolerably clear in substance, signifying the minimal impact of general international law in the interpretative process, even if slightly awkward because 'autonomous interpretation' has its own and different meaning within the law of treaties³⁶). And one might take the view that customary rules on denial of justice provide criteria and presumptions of primary obligations of customary law regarding denial of justice. But it seems slightly strained for an interpreter to simultaneously exclude custom (by necessary implication, also customary rules on denial of justice) and engage in an inquiry under the rubric of 'Denial of Justice under the Fair and Equitable Treatment', relying on concepts taken from a customary law.

It may be more convenient to approach the issue from the procedural perspective. Investment treaty Tribunals, just as international tribunals more broadly, are institutions of limited jurisdiction, therefore a Tribunal has to first determine whether claims based on customary law would fall within their *ratione materiae* jurisdiction. Jurisdictional rules in treaty claims are not usually read as providing jurisdiction for interpreting and applying other rules of international law.³⁷ If customary law-based claims do not directly fall within the jurisdictional four corners, the next question (again, as for any other international tribunal), is whether rules not within jurisdiction nevertheless play a role for adjudicating upon rules within jurisdiction. For example, treaty rules could themselves refer to customary law (as the 'Public International Law principles' proviso in Article 3 might have done), or custom may be a 'relevant' rule that has to be taken into account according to principles of treaty interpretation.³⁸ If, by one route or another, customary law can be articulated as a relevant part of the interpretative argument, a further question, expressed with exceptional clarity by the Tribunal in the *Rompetrol v Romania* award, needs to be considered. Is denial of justice – 'a legal institution which has as its very

³⁵ M Paparinskis, 'Introduction to the Paperback Edition' in *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2014) xlvii-xlix.

³⁶ R Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 30-35.

³⁷ Although note that the dispute settlement clause in the particular BIT is expressed *prima facie* broad terms, as covering '[a]ny disputes relating to investments', Article 7(1) BIT, and not explicitly limited to disputes regarding the BIT.

³⁸ 1969 Vienna Convention on the Law of Treaties arts 31(1), 31(3)(c); *Chagos Marine Protected Area Arbitration (Mauritius v UK)*, Annex VII Arbitration (18 March 2015) paras 293-98; Martins Paparinskis, 'Come Together or Do It My Way: No Systemic Preference' (2014) 108 ASIL Proceedings 246.

essence the relationship between a State and aliens’, ‘not a barrier interposed between a State and its own citizens’ – applicable to the particular legal relationship considered in the investment dispute.³⁹ It is not obvious that it is: by applying *Rompétrol* to *Arij*, one would probably conclude that, while Moldova had an obligation not to mistreat a French national under customary law on treatment of aliens, it did not have such an obligation regarding LeBridge, a company with Moldovan nationality.⁴⁰ Consequently, the simple point that Moldova could not commit a breach of customary law on the treatment of aliens by mistreating its national is sufficient to dispose of the customary law issue.

Another issue, likely to raise readers’ eyebrows, is the Tribunal’s decision on wrongfulness. To recall, the Tribunal found Moldova responsible for unobjectionable judgments of domestic courts because that had frustrated legitimate expectations of the investor generated by the conduct of administrative authorities. The starting point for thinking about the issue should be the mainstream reading of the law of denial of justice, influentially explained by Jan Paulsson as focusing on procedural denial of justice and requiring a full exhaustion of system of justice.⁴¹ One challenge to this explanation has been expressed by relying on different treaty obligations, alleged to qualify the rigour of either the requirement of full exhaustion (‘effective means’) or the procedural focus (expropriation).⁴² Another challenge distances the treaty obligations from criteria of denial of justice set out in customary law.⁴³ There is scope for reasonable disagreement about the merits and degree of success of these challenges. Whatever reservations one might have in that regard are applicable with particular force to *Arij*. It is distinctly odd to conclude that, as the Tribunal itself noted regarding the investor’s invocation of estoppel and expropriation, ‘Moldova can be liable at an international level for the correct application by the Moldovan courts of Moldovan law in lawsuits filed by a private competitor’. International dispute settlement faces sufficient challenges when disciplining conduct of courts that are allegedly engaged in wrongful conduct.⁴⁴ It is not at all obvious that deepening the

³⁹ *Rompétrol Group v Republic of Romania*, ICSID Case ARB/06/3, Award (6 May 2013) (Sir Frank Berman, President; Donal Donovan; Marc Lalonde) para 165, see also paras 166-67.

⁴⁰ It is unclear whether the conditions of Article 11(b) of the 2006 ILC Articles on Diplomatic Protection were satisfied in the facts of this case, nor indeed whether this proposition reflects customary law, *Ahmadou Sadio Diallo (Guinea v DRC)* [2007] ICJ Rep para 93. Of course, other regimes of international law, particularly human rights law, may impose obligations on States regarding treatment of their nationals.

⁴¹ Paulsson (n 14); Z Douglas, ‘International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed’ (2014) 1 ICLQ 867.

⁴² M Sattorova, ‘Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct’ (2012) 61 ICLQ 223, 233-43.

⁴³ *Rompétrol* (n 7) paras 160, 197.

⁴⁴ *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*, PCA Case no 2009-23, Fourth Interim Award on Interim Measures (7 February 2013) (VV Veeder, President; Dr Horacio A Grigera Naón; Professor Vaughan Lowe) paras 77-86.

responsibility of States for lawful conduct of courts is a development in a systemically desirable direction.

A proposition about international law may, of course, be simultaneously odd, systemically undesirable, and accurate, but one would expect the argument in favour of such a rule to be particularly persuasive. It is not entirely clear that the Tribunal's argument satisfies this benchmark. The Tribunal starts by noting (in the concluding paragraph of elaboration of fair and equitable treatment) that '[t]he international responsibility of a State is not determined by the legality of an act under domestic law, but by the principle of attribution in international law'.⁴⁵ Both of these points are right, but the statement, if taken to be exhaustive, is not. International responsibility is determined by attribution of conduct to the State *and* breach of a primary obligation,⁴⁶ and it is the existence of a primary obligation not to permit 'correct application by the Moldovan courts of Moldovan law in lawsuits' if it differs from the position taken by other organs of the State that the Tribunal has to demonstrate.

The Tribunal makes a step in that direction, suggesting that inconsistency may be an element of fair and equitable treatment with a nod to the *MTD v Chile* award.⁴⁷ But an unelaborated reference that does not even specify relevant paragraph(s) cannot quite carry the day on its own. The language of *MTD* award regarding 'inconsistency of action between two arms of the same Government *vis-à-vis* the same investor' is, admittedly, broad.⁴⁸ Still, the rationale of *MTD*, where 'the legal framework of the country provide[d] for a mechanism to coordinate',⁴⁹ may be unduly strained by applying it to inconsistency of action between arms of the government that are set up precisely to be constitutionally autonomous. Indeed, undue coordination of executive and judicial conduct may itself give rise to responsibility for denial of justice under investment law.⁵⁰ The nods to attribution do not reinforce the reasoning, and rather seem to be attempts to bridge the gap regarding primary rules by relying on secondary rules.⁵¹ That, as the *MTD* annulment committee noted, is not a done thing: 'to mix up attribution and breach would require explanation and would indicate confusion'.⁵²

⁴⁵ *Arif* (n 1) para 539.

⁴⁶ 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts Article 2(b); James Crawford, *State Responsibility: The General Part* (CUP 2013) Part III.

⁴⁷ *Arif* (n 1) para 547(b), also para 538.

⁴⁸ *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, ICSID Case no ARB/01/7, Award (15 May 2004) para 163.

⁴⁹ *Ibid.*

⁵⁰ *Flughafen Zürich A.G. y Gestión e Ingeniería IDC S.A. c. Venezuela*, ICSID Case no ARB/10/19, Award (18 November 2014) paras 630-721.

⁵¹ *Arif* (n 1) para 547(c).

⁵² *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, ICSID Case no ARB/01/7, Decision on Annulment (21 March 2007) para 89; see also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v Argentina*, ICSID Case no ARB/97/3, Decision on Annulment (3 July 2002) fn 17.

These observations should not be read as belittling the complexity of questions that reversals by domestic courts of positions held by other public authorities or courts themselves may create for investment law.⁵³ The modest point made here is that the far-reaching implications of the *Arif* award do not appear to be matched by reasoning that will persuade everybody. Future Tribunals faced with similar challenges may be better served by treating the authority of these particular passages with a light touch.

⁵³ Vaughan Lowe, *Regulation or Expropriation* (2002) 55 *Current Legal Problems* 447, 448, 458, 465.