


IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

FILED  
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CLERK OF DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY 

SKY PETROLEUM, INC.,  
Plaintiff,

-vs-

Case No. A-12-CA-023-SS

MINISTRY OF ECONOMY, TRADE, AND  
ENERGY OF ALBANIA, NATIONAL AGENCY  
OF NATURAL RESOURCES OF ALBANIA,  
Defendants.

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**ORDER AND PRELIMINARY INJUNCTION**

BE IT REMEMBERED on January 19, 2011, the Court held a hearing in the above-styled cause, at which Plaintiff Sky Petroleum, Inc., appeared by and through counsel and its corporate representative, but Defendants Ministry of Economy, Trade, and Energy of Albania, and National Agency of Natural Resources of Albania did not appear. The Court considered Plaintiff's Complaint [#1], Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction [#3], and Supplement [#16] thereto, and the arguments of counsel, testimony of Sky's corporate representative, the exhibits admitted at the hearing, the case file as a whole, and the law. The Court now issues this opinion and orders GRANTING Sky's motion for preliminary injunction.

**Background**

Plaintiff Sky Petroleum, Inc. is seeking to compel arbitration of a mineral rights dispute arising out of a contract with Defendants, covering certain reserves within Albania ("Block 4 Onshore Albania, Block 5 Onshore Albania, and Dumre Block Onshore Albania"), the contract being entitled "Production Sharing Contract for the Exploration, Development and Production of

Petroleum In Onshore Albania BLOCKS '4, 5 and DUMRE' between Ministry of Economy Trade and Energy of Albania" (hereinafter, the "Agreement"). Sky Petroleum also seeks a preliminary injunction to maintain the status quo between the parties, pending such arbitration. Article XXI of the Agreement, entitled "Disputes and Arbitration," includes a mandatory arbitration provision:

Any dispute, controversy, claim, or difference of opinion, arising out of or relating to this Contract or the breach, termination or validity thereof, or to the Petroleum Operations carried out hereunder, shall be finally and conclusively settled by arbitration in accordance with the UNCITRAL Arbitration Rules . . . .

Pl.'s Compl. [#1], Ex. A at 52.

As an initial matter, the Court is advised this case has been assigned Protocol Numbers by the Defendants, which are: Protocol Number 160 (11.01.2012) for the National Agency of Natural Resources of Albania (AKBN), and Protocol Number 265 (11.01.2012) for the Ministry of Economy, Trade, and Energy of Albania (METE). The Court lists these numbers because they are apparently important to ensuring proper record-keeping within branches of the Albanian Government.

#### **Findings of Fact and Conclusions of Law**

1. The Court has jurisdiction over the Ministry of Economy, Trade, and Energy of Albania, and the National Agency of Natural Resources of Albania (hereinafter Defendants), and subject matter jurisdiction over this case, pursuant to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1603, and 1605. Specifically: "The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable

international agreement.” 28 U.S.C. § 1330(a). Defendants are each an “agency or instrumentality” of a “foreign state” as defined in § 1603(a). And as explained below, Defendants are not entitled to immunity under § 1605, therefore bringing them within the scope of the jurisdiction conferred upon this Court by § 1330(a).

2. The Defendants have expressly waived sovereign immunity, as the Agreement provides: “AKBN expressly waives any right to claim sovereign immunity in connection with . . . any proceeding to compel enforcement” of the arbitration provision, thus meeting the express waiver requirement found in 28 U.S.C. § 1605(a)(1) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.”). Alternatively, Defendants have implicitly waived immunity by agreeing to resolve any dispute under the Agreement pursuant to the mandatory arbitration terms found in Article XXI of the Agreement. A further waiver of Defendant’s immunity is found in Article XI(1), (2)(b), (3)(a)(iii) of the Albania–America Bilateral Investment Treaty, which authorizes, *inter alia*, resolution of disputes such as this: (1) within United States tribunals such as this Court, (2) pursuant to “previously agreed dispute-settlement procedures,” or (3) according to the “UNCITRAL Arbitration rules.” Treaty Between the Government of the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment, Alb.–U.S., art. XI(1), (2)(b), (3)(a)(iii), Jan. 11, 1995, S. Treaty Doc. No. 104-19, 1995 WL 618743.

3. Additionally, Defendants' immunity is waived under 28 U.S.C. § 1605(a)(2), which provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." The Fifth Circuit has found that causing a foreseeable economic loss in the United States constitutes such a "commercial activity of the foreign state" that "causes a direct effect in the United States" under § 1605(a)(2). *See Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1379, 1384 (5th Cir. 1992).

4. Plaintiff properly served Defendants pursuant to 28 U.S.C. § 1608. Section 1608 specifies that service of foreign governments, political subdivisions, or their agencies or instrumentalities is proper "by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign [state, political subdivision, agency, or instrumentality]." *Id.* § 1608(a)(1), (b)(1). There is such a special arrangement here, found in paragraph 10.2 of the Agreement: "[A]ll matters and notices which are left in writing at the office of the Party concerned or which are received by such Party when delivered personally or sent by facsimile transmission at its main office in Albania shall be deemed to be validly served." The Court finds Plaintiff has accomplished the service Defendants agreed to accept, having made two hand deliveries, faxes from both the United States and the United Kingdom, and emails, all containing the

summons, complaint, various motions, this Court's Notice of Hearing, and Albanian translations of the foregoing.

5. As there is subject matter jurisdiction under the Foreign Sovereign Immunities Act, and Defendants have waived their sovereign immunity, and the Plaintiff having properly served Defendants under both 28 U.S.C. § 1608 and the terms of the Agreement, the Court accordingly finds the Defendants are subject to personal jurisdiction in this Court under 28 U.S.C. § 1330(b). Section 1330(b) provides: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." *Id.* As explained in paragraphs 1 to 3 above, this Court has subject matter jurisdiction under § 1330(a), and as found in paragraph 4, Defendants have been served under § 1608.

6. Defendants received timely notice of the Court's Temporary Restraining Order and hearing on Plaintiff's Motion for Preliminary Injunction. Despite having such notice, Defendants failed to respond or appear at the hearing.

7. Plaintiff has established its right to injunctive relief under Federal Rule of Civil Procedure 65. Rule 65(a)(1) provides "The court may issue a preliminary injunction only on notice to the adverse party." As explained above, the Defendants have received notice.

8. In accordance with the foregoing, this Court finds it has jurisdiction to grant the injunctive relief sought. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 498 (1983) (holding merits of injunctive relief can only be reached if statutory subject matter under the FSIA exists).

9. There are four requirements for issuance of a preliminary injunction:

A preliminary injunction is an extraordinary remedy that should only issue if the movant establishes: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

*Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). All four requirements are met here, specifically:

10. First, Plaintiff has demonstrated a substantial likelihood of success on the merits by submitting prima facie evidence that (1) it has complied with all material terms of the Parties' Agreement, (2) that Defendants have failed to give Plaintiff the proper period of notice and opportunity to cure any breach, and (3) Plaintiff has submitted the Parties' dispute to arbitration in accordance with the Agreement.

11. Second, Plaintiff will suffer immediate and irreparable harm in the absence of the injunctive relief requested because it will be extremely difficult to calculate the monetary damages suffered by Plaintiff if a third-party assumes Plaintiff's duties under the Parties' Agreement.

12. Third, the balance of hardships between the Plaintiff and the Defendants favors the injunctive relief requested by Plaintiff, due to the nature of the Parties and the nature of the potential irreparable harm that could be suffered by the Plaintiff. In particular, Plaintiff seeks only to preserve the status quo pending arbitration, and represents to the Court a \$1.5 million performance bond exists, in favor of Defendants, to make Defendants whole should they prevail at arbitration.

13. Fourth, the injunctive relief requested by Plaintiff serves the public interest as reflected in the Bilateral Investment Treaty between the United States and the Republic of Albania, particularly Article IX(3)(b) of the Treaty, which authorizes preliminary relief to enforce arbitration agreements. *See Treaty Between the Government of the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment, Alb.-U.S., art. XI(3)(b), Jan. 11, 1995, S. Treaty Doc. No. 104-19, 1995 WL 618743.*

14. Based on the nature of the mineral rights in dispute, Plaintiff has no adequate remedy at law. In particular, the record reflects evidence the mineral reserves will be damaged if their operation is turned over to operators utilizing inferior methods, and resultant losses to reserves will be difficult or impossible to calculate.

15. Although the Court initially required a surety bond of \$500,000.00, *see* Order [#3] of January 10, 2012, the Court now sets the surety bond at \$50,000.00, because (1) Sky's counsel represents Sky has posted a performance bond in favor of defendants, in the amount of 1.5 million dollars, which would cover damages to Defendants under the Agreement; (2) this Court, as discussed below, will hear this matter again upon motion and appearance of Defendants; and (3) Sky is only requesting that this Court protect its contractual right to arbitration, not to adjudicate the full merits of the dispute.

16. The Court finds Sky gave actual notice of its intent to arbitrate on December 9, 2011, and formally served Defendants with a Notice of Arbitration on December 23, 2011. Defendants then informed Sky of (1) their refusal to arbitrate, and (2) their position that the Agreement is null and void. Sky only filed this lawsuit after being so informed, and after commencing arbitration

proceedings pursuant to the Agreement, making it ripe and proper for this Court to grant injunctive relief to compel such arbitration and preserve the status quo between the parties until the conclusion of arbitration.

17. The Fifth Circuit employs a two-step analysis to determine whether a party may be compelled to arbitrate. *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381 (5th Cir. 2008) (citations omitted). First, a court must ask if the parties agreed to arbitrate the dispute. *Id.* This first step consists in turn of two threshold inquiries: (1) whether a valid, enforceable arbitration agreement exists, and (2) if so, whether the claims asserted fall within the scope of the agreement. *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002). Here, based on the exhibits, testimony of Plaintiff's corporate representative, and representations of Plaintiff's counsel, both in writing and in open court, the Court finds there is a valid, enforceable arbitration agreement, memorialized in Article XXI of the Agreement between the parties. The Court further finds the claims here, including both Defendant's efforts to terminate the agreement, and Plaintiff's attempts to maintain the agreement and compel arbitration, fall within the scope of the Agreement. The Court therefore ORDERS the parties to arbitrate according to the terms of Article XXI of the Agreement.

18. The Court is mindful of the dangers inherent in granting injunctive relief ex parte. However, despite having had service, the Defendants have not appeared or asked for a continuance of the hearing regarding Plaintiff's Motion for Preliminary Injunction. Nevertheless, should Defendants appear and request a further hearing on this matter, such a hearing will be provided by this Court.



Having then reviewed the Motion, all evidence presented, and arguments of counsel, the Court finds the Plaintiff's Motion for Preliminary Injunction should be and is hereby GRANTED.

Accordingly:

IT IS ORDERED that Plaintiff Sky Petroleum's Motion for Preliminary Injunction [#3] is GRANTED;

IT IS FURTHER ORDERED that Defendants the Ministry of Economy, Trade, and Energy of Albania (METE) and the National Agency of Natural Resources of Albania (AKBN) (collectively "Defendants"), and all persons acting in concert with them, are ENJOINED from awarding, transferring, or otherwise disposing of any right to explore, develop and/or produce petroleum in Block 4 Onshore Albania, Block 5 Onshore Albania, and Dumre Block Onshore Albania ("the Contract Area") until a final arbitration award is issued pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in the arbitration proceedings between Sky Petroleum and Defendants;

IT IS FURTHER ORDERED that Defendants shall remove from their website or other publicly available documents all references that the Contract Area is "free" or otherwise available for new contractors, until the aforementioned final arbitration award is issued;

IT IS FURTHER ORDERED that Plaintiff and Defendants shall arbitrate their dispute according to the terms of Article XXI of the Agreement;

IT IS FURTHER ORDERED that, having been superseded by this preliminary injunction, the temporary restraining order of this Court's Order [#8] of January 10, 2012, is DISSOLVED;

IT IS FINALLY ORDERED that Plaintiff Sky Petroleum shall post a surety bond in the amount of FIFTY THOUSAND AND 00/100 DOLLARS (\$50,000.00);

UNDER THE LAWS OF THE UNITED STATES THIS ORDER IS BINDING AND IMMEDIATELY ENFORCEABLE AND BINDING UPON DEFENDANTS MINISTRY OF ECONOMY, TRADE, AND ENERGY OF ALBANIA, AND NATIONAL AGENCY OF NATURAL RESOURCES OF ALBANIA.

SIGNED this the 20<sup>th</sup> day of January 2012.

  
SAM SPARKS  
UNITED STATES DISTRICT JUDGE