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The Ethiopia-United States Compensation Agreement: Dickey Ending to a Spicy Tale

by
Stefan A. Riesenfeld†

I BACKGROUND

On December 19, 1985, the government of the United States and the Provisional Military Government of Socialist Ethiopia [hereinafter PMGSE] concluded an agreement for the settlement of claims of nationals of the United States relating to property, rights, and interests of such nationals in Ethiopia affected by measures of nationalization, expropriation or other restrictive measures ordered or decreed by the Ethiopian Government.¹ This agreement, the legal basis of which rests on 22 U.S.C. § 2668(a),² spelled the ultimate solution to a complex judicial controversy that had prompted three reported court decisions,³ *amicus curiae* briefs by the United States⁴ and the American Bar Association, and the issuance of the so-called Robinson Letter.⁵

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1. The Compensation Agreement Between the Government of the United States and the Provisional Military Government of Socialist Ethiopia is reproduced in 25 I.L.M. 56 (1986) [hereinafter Compensation Agreement].

2. 22 U.S.C. § 2668a was transferred to Title 22 in 1982 as part of the revision of Title 31 of the United States Code. Prior to that date, it was codified as 31 U.S.C. § 547. It originated in an act passed in 1896. See Riesenfeld, *The Powers of the Executive to Govern the Rights of Creditors in the Event of Defaults of Foreign Governments*, 1982 U. OF ILL. L. REV. 319, 323 (background and purpose of 22 U.S.C. § 2668a).

3. *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984); *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660 (W.D. Mich. 1985); *Ethiopian Spice Extraction Share Co. v. Kalamazoo Spice Extraction Co.*, 543 F. Supp. 1224 (W.D. Mich. 1982).

4. Brief for the United States as *Amicus Curiae*, *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984) (No. 82-1521) [hereinafter Brief for the United States as *Amicus Curiae*]. (The brief is on file at the offices of the *International Tax and Business Lawyer*.)

5. *United States: Department of State Letter with Regard to Act of State Doctrine and Foreign Expropriations* 22 I.L.M. 207 (1983) (Robinson Letter). It was addressed to the Honorable Rex E. Lee, Solicitor General of the United States and dated November 19, 1982. It was motivated by the significance attached by the United States District Court for the Western District of Michigan in the case of *Ethiopian Spice Extraction Share Co. v. Provisional Military*

The dispute between the United States and PGMSE grew out of the nationalization of enterprises in Ethiopia undertaken by the revolutionary government in the wake of its assumption of power in September 1974. Since a number of the enterprises affected were owned by United States nationals, the issue of proper compensation arose and created a conflict between the two governments and, after failure of negotiations,⁶ led to the imposition of sanctions, consisting of the suspension of development assistance to Ethiopia as required by the Hickenlooper Amendment to the Foreign Assistance Act.⁷ The aide-memoire informing the Ethiopian Embassy in Washington of that event reminded Ethiopia that the suspension would cease if meaningful steps were taken toward the resolution of the compensation problem.⁸

One of the enterprises affected by the nationalization program was the Ethiopian Spice Extraction Share Company [hereinafter ESESCO].⁹ That corporation was established in 1966 under the laws of Ethiopia by a United States parent corporation, the Kalamazoo Spice Extraction Company [hereinafter Kal-Spice], a Michigan corporation. Kal-Spice owned 80% of the shares of the Ethiopian subsidiary, and arranged financing, trained staff and built a production facility for ESESCO with the understanding that the Ethiopian corporation would sell each year to the Michigan corporation its entire output of oleoresin spices.

In 1975, PMGSE issued an expropriation decree, effective as of February 3, 1975, vesting 51% of the stock of ESESCO in the government, thus reducing the stock owned by the Michigan corporation to approximately 40%. PMGSE's Ministry of National Resources Development appointed three directors to ESESCO's board of directors, consisting of five members, and thus controlled ESESCO's business activities. Although Ethiopia allegedly offered approximately \$460,000 as compensation, Kal-Spice did not accept that sum, claiming that the value of the property amounted to \$11 million.

Gov't of Socialist Ethiopia, 543 F. Supp. 1224 (W.D. Mich. 1982) to the absence of a "Bernstein Letter".

6. Pursuant to the Trade Act of 1974 § 502(b), eligibility to receive generalized preferences under the Act is excluded if a potential beneficiary developing country:

has nationalized, expropriated or otherwise seized ownership or control of property owned by a United States citizen, or by a corporation . . . which is 50 percent or more beneficially owned by United States citizens, unless the President determines that . . . good faith negotiations to provide prompt, adequate and effective compensation under the applicable provisions of international law are in progress, or such country is otherwise taking steps to discharge its obligations under international law with respect to such citizen, corporation . . . and promptly furnishes a copy of such determination to the Senate and House of Representatives.

Trade Act of 1974 § 502(b), 19 U.S.C. § 2462 (1983).

On March 24, 1975 President Ford issued a determination under that provision, finding that Ethiopia was eligible for participation in the United States system of general tariff preferences, 1975 DIG. U.S. PRAC. INT'L L. 486, 514.

7. 22 U.S.C. §§ 2353, 2370(e) (1983).

8. 1979 DIG. U.S. PRAC. INT'L L. 1388.

9. See Ethiopian Spice Extraction Share Co. v. Kalamazoo Spice Extraction Co., 543 F. Supp. 1224 (W.D. Mich. 1982) for the facts of the nationalization of ESESCO.

II

THE LITIGATION IN THE COURTS OF THE UNITED STATES

Prior to the nationalization of ESESCO, Kal-Spice had placed an order with it for the purchase of a certain quantity of oleoresin which was delivered. Not having received payment for that shipment, ESESCO filed a complaint (subsequently amended and removed to the United States District Court for the Western District of Michigan)¹⁰ seeking to recover the purchase price for the merchandise in the amount of slightly less than \$2 million, plus interest, costs, and attorneys' fees. Kal-Spice filed a counterclaim asserting four separate claims against ESESCO, totaling an amount far in excess of the purchase price for the oleoresin. These four claims alleged expropriation of Kal-Spice's shares in ESESCO, wrongful deprivation of Kal-Spice's shareholder rights, breach of the agreement for the sale of the entire output, and wrongful appropriation and conspiracy to appropriate trade secrets. ESESCO moved for partial summary judgment for the purchase price, while Kal-Spice moved for joinder of PMGSE as an indispensable party plaintiff or, alternatively, to name PMGSE as being in fact a party plaintiff. This motion was based on the contention that the facts warranted disregard of ESESCO's separate corporate entity. In addition, Kal-Spice filed a separate complaint against PMGSE seeking damages based on its expropriation of the shares owned by Kal-Spice. PMGSE moved for dismissal.

The United States District Court granted ESESCO's motion for partial summary judgment against Kal-Spice, fixing the amount of the principal awarded by the judgment at \$1,961,980.48 and the amount of interest at the contractual rate minus a sum already paid.¹¹ It dismissed Kal-Spice's cross-complaint and denied its motion to join PMGSE as a party plaintiff.

While PMGSE had moved for the dismissal of the complaint against it by Kal-Spice on the grounds of lack of jurisdiction because of the absence of minimum contacts with the State of Michigan and because of sovereign immunity, the court rested its dismissal on the act of state doctrine.¹² It held that in the instant case none of the recognized exceptions to, or limitations on, that doctrine were applicable. The court rejected resort to the so-called commercial and counterclaim exceptions on the grounds that the nationalization of local enterprises was clearly public and governmental in nature¹³ and that the counter-claim exception was available only if the Executive had issued a communication in the nature of a Bernstein letter.¹⁴ Turning to the applicability of the so-called Hickenlooper exception, the court held that the

10. See *Ethiopian Spice Extraction Share Co. v. Kalamazoo Spice Extraction Co.*, 543 F. Supp. 1224 (W.D. Mich. 1982) (for the pleadings in the case); *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984) (for subsequent phases of the litigation).

11. 543 F. Supp. at 1233.

12. *Id.* at 1227.

13. *Id.* at 1229.

14. *Id.* at 1229.

relevant statute¹⁵ covered only cases in which there was an attempt to market the expropriated assets in the United States, which did not hold true with respect to the shares in ESESCO.¹⁶ In so ruling, the court relied primarily on the interpretation given to the Hickenlooper Amendment in the case of *Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co., Inc.*¹⁷

The court thus had to examine the questions of whether reliance on the act of state doctrine was precluded by Article VIII § 2 of the Treaty of Amity and Economic Relations between the United States and Ethiopia of 1953¹⁸ because the situs of expropriated property was inside the United States.¹⁹ The court concluded that the treaty standard of "prompt payment of just and effective compensation" was "so inherently general, doubtful, and susceptible of multiple interpretation that . . . a court cannot reasonably be asked to apply them to a particular set of facts."²⁰ It also held that the situs of the expropriated ESESCO shares was in Ethiopia, regardless of the presence of the stock certificates in Michigan. In reaching that result, the court relied on § 64 of the Restatement (Second) of Conflicts of Law in conjunction with Article 341 of the Ethiopian Commercial Code.²¹

Kal-Spice appealed from the dismissal of its counterclaim, contending that the court below had erred in applying the act of state doctrine to the facts of the case because it misconstrued the scope of the Hickenlooper Amendment and the effect of the Treaty of Amity and Economic Relations between the United States and Ethiopia.²² Appellant contended that the act of state doctrine did not bar adjudication of an expropriation claim under the Treaty of Amity with Ethiopia, because that treaty provided controlling legal principles that were unambiguous and capable of direct judicial application. The brief emphasized that the "prompt, just and effective" formula, used in Article VIII § 2 of the Treaty was "the heart of all post-World War II property protection clauses in treaties concluded by the United States"²³ as well as by other industrial powers,²⁴ supporting its argument with copious examples from such treaties.

15. 22 U.S.C. § 2370(e)(2) (1983). The amendment was made applicable "in a case in which a claim of title or other right to property is asserted by any party . . . based upon or traced through a confiscation or other taking . . . by an act of . . . state . . ." *Id.*

16. 543 F. Supp. at 1231.

17. *Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co., Inc.*, 652 F.2d 231 (2d Cir. 1981).

18. Treaty of Amity and Economic Relations, Sept. 7, 1951, United States-Ethiopia, 4 U.S.T. 2134, T.I.A.S. No. 2864 (1953).

19. 543 F. Supp. at 1231.

20. *Id.* at 1230.

21. *Id.* at 1242.

22. Brief for Appellant, *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984 No. 82-1521) [hereinafter Brief for the Appellant]. (The brief is on file at the offices of the *International Tax and Business Lawyer*.)

23. Brief for Appellant, *supra* note 22, at 17.

24. *Id.* at 27.

In addition, appellant contended that the Hickenlooper Amendment barred the application of the act of state doctrine in this case because the statutory language did not contain any requirement that the expropriated property be brought into the United States.²⁵ It argued that the phrase "in a case in which a claim of title or other right to property is asserted" did not exclude claims to title to property located outside of the United States and that the location of the expropriated stock had no bearing on the applicability of the statute. Apparently the brief saw no distinction between claims of title and claims for damages. Rather, it implied that all claims based on expropriation without observance of the international compensation standards were covered by Hickenlooper and that the interpretation of the District Court was inconsistent with the language and the legislative history of the statute.²⁶

The United States filed a brief as *amicus curiae*, supporting appellant's argument that the Treaty of Amity with Ethiopia laid down a meaningful and judicially enforceable standard of measuring compensation and thus fell under the "treaty exception" recognized by the United States Supreme Court.²⁷ The amicus brief also made it clear that "where there is a controlling legal standard, the court should not presume from executive silence that adjudication would conflict with American foreign policy interests."²⁸ Attached, as Appendix A, was a letter by the Legal Advisor of the Department of State, Mr. Davis R. Robinson, to the Solicitor General of the United States, informing him that "[w]hen, as in this case, there is a controlling legal standard for compensation, we believe that the presumption should be that adjudication would not be inconsistent with foreign policy interests under the Act of State Doctrine Therefore, we would anticipate that silence on the part of the Executive in such cases would not be relied upon as a basis for judicial abstention under the Act of State Doctrine."²⁹

The United States Court of Appeals³⁰ disagreed with the court below and held that the treaty exception to the act of state doctrine was applicable, inasmuch as the requirement of the payment of prompt, just, and effective compensation furnished a controlling legal standard in the area of international law. Therefore, the court reversed the dismissal of Kal-Spice's counterclaim and remanded for further proceedings. The court noted that the

25. *Id.* at 41-49.

26. In *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1987), a panel of the United States Court of Appeals for the Ninth Circuit gave the Hickenlooper Amendment a broad application and applied it to a claim for conversion of a dollar-denominated certificate of deposit located in Mexico. On the merits, however, the court held that the institution of exchange controls did not amount to an expropriation. *Id.* at 821.

27. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

28. Brief for the United States as *Amicus Curiae*, *supra* note 4, at 29.

29. See Brief for the United States as *Amicus Curiae*, *supra* note 4, at Appendix A; see also 22 I.L.M. 207 (1983).

30. *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984).

inapplicability of the act of state doctrine left many issues unresolved and that further proceedings would be an arduous task for all parties involved.³¹

On remand, the United States District Court³² addressed the issue of jurisdiction over the subject matter under the Foreign Sovereign Immunities Act and the Due Process Clauses. It concluded that jurisdiction existed over the action of *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*. The court rested its jurisdiction over the subject matter on 28 U.S.C. § 1605(a)(3). PMGSE argued that the subsection was inapplicable to expropriation of intangibles, such as stock, but the court held that an expropriation of the majority of the stock was tantamount to an expropriation of the assets of the corporation and therefore the stock was property within the meaning of § 1605(a)(3).³³ Since the property was owned by ESESCO, an instrumentality of Ethiopia, and that instrumentality, after nationalization, had sold at least \$3.7 million worth of oleoresins to companies in the United States other than plaintiff, the jurisdictional nexus required by § 1605(a)(3) was present.³⁴ The court likewise rejected PMGSE's contention that the minimum contacts required for the jurisdiction over the person were lacking. Relying on *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*,³⁵ the court held that in the case at bar the separate juridical identities of ESESCO and PMGSE should be disregarded and ESESCO's contacts with the United States be attributed to defendant.³⁶ Article XVII of the treaty, which vested the International Court of Justice with jurisdiction of the disputes between the High Contracting Parties, was held to be no obstacle to the exercise of jurisdiction by domestic courts over controversies between a national of the United States and Ethiopia.³⁷ A decision on the merits, however, was never rendered, since the Compensation Agreement between the United States and the PMGSE of December 16, 1985 stipulated the dismissal of both actions pending in the United States District Court for the Western District of Michigan upon the filing of a joint stipulation by the litigants pursuant to the Compensation Agreement. That stipulation was filed on December 26, 1985.³⁸

31. *Id.* at 428.

32. *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660 (W.D. Mich. 1985).

33. *Id.* at 663.

34. *Id.* at 664.

35. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

36. 616 F. Supp. at 666.

37. *Id.* at 664.

38. See Compensation Agreement, *supra* note 1, at 56.

III THE COMPENSATION AGREEMENT

The Compensation Agreement between the United States and the Provisional Government of Socialist Ethiopia is in the nature of a global lump sum settlement. It covers any and all claims by nationals of the United States relating to property, rights, and interests in Ethiopia affected by measures of nationalization, expropriation, and other restrictive measures ordered or decreed by the Ethiopian Government³⁹ as well as claims, including counterclaims by the Ethiopian Government, its agencies or instrumentalities with respect to such measures.⁴⁰ It provides for the discharge of all claims covered thereby upon the payment by the PMGSE of a sum of \$7 million, consisting of an initial payment of \$1.5 million and the payment of ten semiannual installments of \$550,000 each to begin on July 19, 1986.⁴¹ The Ethiopian Government is subrogated to all properties involved in the discharged claims.⁴² The United States reserved to itself exclusive jurisdiction over the distribution of the monies received and to be received under the agreement by such methods as it may choose to adopt.⁴³

In a separate agreed minute of the same date⁴⁴ provision was made, with the consent of Kal-Spice and its affiliates, for the extension of that agreement to all claims and counterclaims asserted in the litigation in the United States District Court for the Western District of Michigan. The minute stipulated that both Governments intended that both of those actions should be terminated with prejudice to the claims of all parties concerned and without payment by any party to any other party and that they expected the attorneys representing the parties to the litigations to submit to the court a joint stipulation to that effect. Ethiopia was to receive the transfer of Kal-Spice's remaining interest in ESESCO.

IV CONCLUSION

As a result, Kal-Spice's share in the \$7 million compensation depends on the assessment of its actual loss in relation to the assessment of the actual loss of the other and competing claimants. Kal-Spice, however, is assured that it is relieved of all payment for the spices received from ESESCO to the extent that they remained unpaid.

Ethiopia by concluding the agreement removed all obstacles to receiving assistance by the United States Government under the various programs. Thus, in the last analysis, the United States pays all.

39. *Id.* at art. II.

40. *Id.* at art. V(2).

41. *Id.* at art. III.

42. *Id.* at art. VI.

43. *Id.* at art. V(3).

44. The Agreed Minute is reproduced in 25 I.L.M. 62 (1986).