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New ICSID awards: Salini and Lucchetti *

Two new ICSID awards have been published recently. The present report highlights some of the points addressed therein.

In decision on jurisdiction in **Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan**,¹ the tribunal dealt with a dispute about certain amounts of money allegedly owed to the Claimant for the construction of a dam in Jordan. Claimant's rights arose out of a contract which presumably had been breached. The relevant Bilateral Investment treaty ("BIT") was the one between Italy and Jordan. A provision of the contract referred to arbitration if certain conditions had been met.

Contractual disputes

The Tribunal was posed with the question of whether to know a

¹ Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, award of November 9, 2004.
<http://worldbank.org/icsid/cases/awards.htm>

contractual dispute or not. Making reference to the relevant provisions of the BIT and the contract, the Tribunal concluded that it had to respect the choice of the parties, but noted "...the dispute settlement procedures provided for in the Contract could only cover claims based on breaches of the Contract. Those procedures cannot cover claims based on breaches of the BIT."²

Most Favored Nation clause

As a subsidiary argument Claimant invoked the Most Favored Nation (MFN) treatment clause of the relevant BIT in order to incorporate the Jordan-US BIT and the Jordan-UK BIT whereby investors were entitled to refer to ICSID any dispute arising from their construction contracts. The Tribunal distinguished itself from *Maffezini* and did not find any intent by the parties to extend the MFN clause to dispute settlement. It stated: "In the event that, as in this case, the dispute is between a foreign investor and an entity of the Jordanian State, the contractual disputes between them must, in accordance with Article 9(2), be settled under the procedure set forth in the investment agreement."³

Umbrella clause

Article 2(4) of the BIT stated that "Each Contracting Party shall create and maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor." Claimants sustained that the effect of this provision was to transform contractual disputes into breaches of the BIT.

² *Id* at para 96.

³ *Id* at para 119.

The Tribunal rejected the argument and pointed out that through that article each party "...committed itself to create and maintain a legal framework apt to guarantee the compliance of all undertakings assumed with regard to each specific investor."⁴

It then clarified: "Of course, each State Party to the BIT between Italy and Jordan remains bound by its contractual obligations. However, this undertaking was not reiterated in the BIT. Therefore, these obligations remain purely contractual in nature and any disputes regarding the said obligations must be resolved in accordance with the dispute settlement procedures foreseen in the contract. Contrary to what the Claimants argue, this is not at all an absurd solution: the States Parties to the BIT are still bound by their treaty obligations as well as their contract obligations, but the dispute settlement procedures in each case are different."⁵

The Tribunal then retained jurisdiction over the BIT disputes but decided it had no jurisdiction over the contractual claims.

In *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*,⁶ a Chilean past company established a factory close to an environmental protected area in Lima, Peru. At the end of 1997 disputes arose between the Municipality of Lima which ended up in court. On August 3, 2001 the Chile-Peru BIT entered into force.

⁴ *Id* at para 126.

⁵ *Id* at para 127.

⁶ *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, award of February 7, 2005, <http://www.asil.org>

On December 24, 2002 ICSID received a request for arbitration from *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A.* against the Republic of Peru.

Lucchetti was successful to run operations through different local court judgments until August of 2001 when the municipality of Lima revoked its license to operate.

Ratione temporis

Peru argued that these judgments were obtained under corrupt circumstances and thus there had been a continuous dispute between them and Claimant since 1997. As a consequence of that Respondent argued that the Tribunal lacked jurisdiction *ratione temporis*.

Citing *Mavrommatis* the Tribunal had no doubt that in 1998 a dispute had arisen between the parties. The issue at stake was whether the 2001 dispute was a continuation of the 1997 dispute.

The Tribunal said that "...it will in each instance have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute."⁷ It then concluded that the "subject matter of the earlier dispute thus did not differ from the municipality's action in 2001, which prompted Claimants to institute the present proceedings."⁸

Corruption allegations

The Tribunal also mentioned "the alleged illegalities surrounding the manner in which the 1998 judgments were procured". It pointed out that "if proved, they would provide an independent ground for holding that the

⁷ *Id* at para 50.

⁸ *Id* at para 52.

judgments could not have had the effect of terminating the earlier dispute. However, since the tribunal has already concluded on other grounds that these judgments did not end the dispute, it is unnecessary for it to address the issue.”⁹

The Tribunal then held that it did not have jurisdiction over the merits of the claim.

A parallel not well-known State- State dispute under the BIT between Peru and Chile had been initiated whereby the former argued that the dispute fell outside the scope of protection of the BIT.

On January 18, the ICSID Tribunal of Tokios **Tokeles v. Ukraine** issued order No. 3¹⁰ related, *inter alia*, to provisional measures and diplomatic protection. The Tribunal found that the provisional measure was not necessary to preserve the rights of the Claimant.

Provisional measures

The Respondent had argued that the proceedings upon which Claimant had asked a provisional measure were not part of a “legal dispute arising directly out of” Claimant’s investment. The Tribunal held that “It is not necessary for a tribunal to establish that the actions complained of in a request for provisional measures meet the jurisdictional requirements of Article 25.”¹¹ And then quoting *Maffezini* it said that a provisional measure can be ordered by a tribunal “if the actions of the opposing party ‘relate to the subject matter of the case before the tribunal and

not to separate, unrelated issues or extraneous matters’.”¹²

Diplomatic protection

Upon resignation of one of the arbitrators of the Tribunal, the proceeding had been suspended. During that time Claimant had asked the Government of Lithuania to protect “Lithuanian investments in Ukraine”. The Lithuanian Embassy in Ukraine submitted a letter to the Ukrainian Ministry of Foreign Affairs alleging violation of Claimant’s subsidiary rights under Ukrainian law due to a tax investigation.

The Tribunal said that under Article 26 of the ICSID Convention, the investor had an obligation not to pursue diplomatic protection. It held: “The term ‘diplomatic protection’ includes not only espousing the claim of a national, but also a variety of other actions –such as formal diplomatic interventions of the type at issue here- that may be undertaken by a State to protect its national’s interests in respect of a matter in dispute.”¹³

It then went on and pointed out: “Once the parties consent to arbitration, they are bound by the obligations of the Convention until an award is rendered or the case is terminated”.¹⁴ However the Tribunal found that although Claimant’s recourse to diplomatic protection was inconsistent with its obligations under the ICSID Convention, the recourse appeared to have ceased and there was no record of further diplomatic intervention and requests. It concluded

⁹ *Id* at para 57.

¹⁰ Tokios Tokeles v. Ukraine, order No. 3 of January 18, 2005. <http://www.worldbank.org/icsid>

¹¹ *Id* at para 11

¹² *Id.*

¹³ *Id* at para 21.

¹⁴ *Id* at para 22.

that the appropriate response was not to
discontinue the proceedings.

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The views expressed here should not be attributed to the organizations with which he is affiliated.